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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. A FAIR READING OF *SEYMOUR, MATTZ, DECOTEAU, ROSEBUD* AND *SOLEM* CLEARLY SUSTAINS THE VIEWS SET FORTH IN THE OPINION OF THE UTAH SUPREME COURT	4
II. THIS COURT HAS CONSISTENTLY RECOGNIZED THE SIGNIFICANCE OF PUBLIC DOMAIN TERMINOLOGY IN THE OPERATIVE LANGUAGE OF SIMILAR GENERAL ALLOTMENT ACT STATUTES AND THE UNITED STATES HAS CONSISTENTLY AGREED WITH THIS VIEW	8
A. *Seymour v. Superintendent*, 368 U.S. 351 (1962)	8
B. *Mattz v. Arnett*, 412 U.S. 481 (1973)	10
C. *DeCoteau v. District County Court*, 420 U.S. 425 (1975)	14
D. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)	22
E. *Solem v. Bartlett*, 465 U.S. 463 (1984)	29
CONCLUSION	30
APPENDIX	
Herbert T. Hoover, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era: History*, a Paper presented to the Western History Association, October 1986	1a

TABLE OF CONTENTS—Continued

Page

LeAnn Larson LaFave, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era Part II: The Law*, a Paper presented to the Western History Association, October 1986 ..... 37a

Memorandum for the United States, *Seymour v. Superintendent*, 368 U.S. 351 (1962) 58a

Brief of the United States as *Amicus Curiae*, *Mattz v. Arnett*, 412 U.S. 481 (1973) 61a

Brief of the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) 84a

Brief of the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) 112a

TABLE OF AUTHORITIES

CASES: Page

Antoine v. Washington, 420 U.S. 194 (1975) 9
Ash Sheep Co. v. United States, 252 U.S. 159 (1920) 28
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 1
DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Little Light v. Crist, 649 F.2d 682 (9th Cir. 1981) 29
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 26, 27
Mattz v. Arnett, 412 U.S. 481 (1973) ..... *passim*
Montana v. Crow Tribe, 918 F.2d 895 (9th Cir. 1985), *summarily aff'd* 484 U.S. 997 (1988) 29
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..... *passim*
Seymour v. Superintendent, 368 U.S. 351 (1962) ..... *passim*
Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*
Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1 (1957) 6
United States v. Pelican, 232 U.S. 442 (1914) 9
Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) 5
Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981) 4, 5

STATUTES:

24 Stat. 388, General Allotment Act of 1887 ..... *passim*
Act of March 2, 1889, 25 Stat. 896 25
Act of May 27, 1902, 32 Stat. 245 2
Act of Jan. 27, 1906, 34 Stat. 9 5
Act of July 20, 1912, 37 Stat. 196 5
Utah Code Ann. §§ 17-1-10, 17-1-27 6

CONGRESSIONAL MATERIALS:

36 Cong. Rec. 1388 (1903) 4-5
40 Cong. Rec. 1064, 1332 (1906) 5
H.R. Doc. No. 892, 62d Cong., 2d Sess. (1912) 6
H.R. Doc. No. 1250, 63d Cong., 3d Sess. (1914) 6
H.R. Rep. No. 291, 59th Cong., 1st Sess. (1906) 5

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 791, 50th Cong., 1st Sess. (1988)	10
S. Rep. No. 57, 53d Cong., 1st Sess. (1893)	14
S. Rep. No. 139, 59th Cong., 1st Sess. (1906)	5
S. Rep. No. 4240, 58th Cong., 3d Sess. (1905)	5
PROCLAMATION AND EXECUTIVE ORDERS:	
Presidential Proclamation of September 1, 1906, 34 Stat. 3228	5
MISCELLANEOUS:	
[1905] Commissioner of Indian Aff. Rep.	5
59 I.D. 393 (1947)	6
36 Fed. Reg. 19920 (1971)	6
Brief for Petitioner, *Seymour v. Superintendent*, 368 U.S. 351 (1962)	9
Brief for Respondent, *DeCoteau v. District County Court*, 420 U.S. 425 (1975)	21
Brief for the United States as *Amicus Curiae*, *State of Utah v. Ute Indian Tribe*, U.S. Supreme Court No. 85-1821, November 1986	6
Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57 (1984)	7
Department of the Interior Memorandum from Finney to Howell (October 1912)	6
Herbert T. Hoover, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era*, a Paper presented to the Western History Association (October 1986)	7
LeAnn Larson LaFave, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era Part II: The Law*, a Paper presented to the Western History Association, October 1986	7
Letter from Commission of Indian Affairs to Secretary of the Interior (June 19, 1941)	6
Memorandum from the Solicitor (Nov. 18, 1964)	6
Minutes of Councils with Uintah and White River Indians (May 18 to May 23, 1903)	5

TABLE OF AUTHORITIES—Continued

	Page
Stipulation, *Uintah and White River Bands of the Ute Indians v. United States*, 139 Ct.Cl. 1 (1957)	6
Transcript of Oral Argument, *Erickson v. U.S. ex rel. Feather*, U.S. Supreme Court No. 73-1500, *decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975)	16-17, 20-21
Transcript of Oral Argument, *Mattz v. Arnett*, 412 U.S. 481 (1973)	11-12
Transcript of Oral Argument, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)	23
U.S. Department of Commerce, *Federal and State Indian Reservations* 63 (1974)	3
David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U.L. Rev. 1247	7

BRIEF FOR UINTAH COUNTY, UTAH, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The concern that prompts the filing of this Brief can be simply stated. Prior to the litigation of this reservation boundary issue, this Court, the United States and the Tribe itself had taken the position that the Ute Tribe's reservation consisted of 1 million acres, not the 4 million acres encompassed within the boundaries of the original Uncompahgre and original Uintah reservations. More than 18,000 residents of Duchesne County and Uintah County thus face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Tribe. For its part, the Ute Tribe has enacted a comprehensive Tribal Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Compared to *Solem v. Bartlett*, 465 U.S. 463 (1984), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Mattz v. Arnett*, 412 U.S. 481 (1973), or *Seymour v. Superintendent*, 368 U.S. 351 (1962), more people, more area and more resources are at stake here because of the conflicting decisions of the Utah Supreme Court and the United States Court of Appeals for the Tenth Circuit.

In this respect, *Amicus* Uintah County is doubly impacted. The original boundaries of both reservations extend into Uintah County and encompass a substantial percentage of the entire county land base, not heretofore deemed to be within the boundaries of an Indian reservation.

SUMMARY OF ARGUMENT

The Utah Supreme Court correctly concluded that the Uintah Act of May 27, 1902 (32 Stat. 245), Joint Appendix 159-160 (hereafter "JA") as amended, which provided that the unallotted lands of the Uintah Reservation be restored to the public domain, constituted clear evidence of disestablishment, as this Court has recognized. In a conflicting opinion, the *en banc* majority of the court of appeals mistakenly believed that this Court's decision in *Solem* dictated "a different result," despite the fact that in *Solem* the Court indicated that it was following a path clearly marked by its prior decisions. The fundamental error of the *en banc* majority centered around a misconstruction of *Solem* regarding the significance of the public domain terminology. Up front, *Solem* specially referenced public domain terminology in conjunction with other operative language that "strongly" suggested disestablishment and the *en banc* majority missed the point. *Solem* at 470, citing *Seymour* at 355 (restored to public domain language). Instead, the *en banc* majority focused on a footnote in that portion of the *Solem* opinion directed only to miscellaneous provisions in the balance of the *Solem* Act. *Solem* at 474-475. Even there, the *en banc* majority simply painted *Solem* with too broad a brush.

As a result, the *en banc* majority failed to take into account important factors uniformly understood to constitute explicit expressions of congressional intent to disestablish both the original Uintah and the original Uncompahgre Reservation. Moreover, the *en banc* majority ignored the unwavering position of the federal government since 1897 that the original Uncompahgre Reservation no longer exists. (The United States participating as *Amicus Curiae*, failed to inform the *en banc* court that the Uncompahgre documentation "compels" a conclusion that the reservation *was* disestablished, as the United States subsequently told this Court; instead, the United States simply took no position on this nearly identical *in pari materia* Act, and argued the other *in pari materia*

Act *was not* intended to disestablish the original Uintah reservation.) Accordingly, the *en banc* majority paid little attention to the similarly long-standing administrative and congressional treatment of the original Uintah Reservation. Relying on what it deemed the "*Solem* standards," it then fashioned the second largest Indian reservation in the United States.[1] In construing operative public domain language as it did, the *en banc* majority thus attempted to "remake history," which this Court admonished "cannot" be done in order to resurrect reservations that long ago ceased to exist. *DeCoteau*, 420 U.S. at 449; *Accord Rosebud*, 430 U.S. at 615. The Utah Supreme Court cannot be faulted for failing to follow this path.

In *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court has consistently recognized the importance of public domain language when presented with issues involving similar surplus land statutes also enacted pursuant to Sec. 5 of the General Allotment Act of 1887, 24 Stat. 388. The arguments of the United States in *Seymour*, *Mattz*, *DeCoteau*, and *Rosebud*, are all founded on this express understanding. The United States has consistently pointed out, by contrast, that disestablishment was clearly intended when the operative language of other statutes contained this express public domain terminology. In *Solem*, the United States did not repudiate or otherwise refute this fundamental point. Instead, the United States relied on a series of other more sophisticated arguments, none of which are controlling here.

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[1] The largest is the Navajo Reservation. *See* U.S. Department of Commerce, *Federal and State Indian Reservations* 63 (1974). With some three million acres of non-Indian owned lands included within its boundaries, the Uintah and Ouray Reservation, would under the *en banc* decision, contain the largest concentration of such lands of any recognized reservation. *See, e.g., Federal and State Indian Reservations, supra.*

ARGUMENT

I. A FAIR READING OF *SEYMOUR, MATTZ, DECOTEAU, ROSEBUD* AND *SOLEM* CLEARLY SUSTAINS THE VIEWS SET FORTH IN THE OPINION OF THE UTAH SUPREME COURT.

Over half a century after Congress expressly provided that the lands of the original Uintah Valley Reservation in Utah, not allotted to individual Tribal members or reserved for their benefit or other purpose, be "restored to the public domain," and after a substantial rural population (over ninety percent of which are non-members) has paid for, resided on and developed this area of the public domain (ninety percent of which is now held in fee), a challenge to the longstanding assumption of State jurisdiction in the area was mounted in *1975*. This belated effort to roll back history has resulted, after an additional eighteen years of Federal and State litigation, in the question of statutory construction now presented to this Court: whether Congress intended when making these lands a part of the public domain, to leave the area within the limits of the Reservation. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Ut. 1981). *Amicus* County is not unmindful of the longstanding rule that counsels how doubtful expressions in Indian legislation are resolved, but the intent and purpose of the *Ute* legislation was never in doubt and should not be in doubt now. Congress utilized public domain terminology in the operative language of the *Ute* legislation, and later amended but never repealed, directly or by implication, this language—language that this Court has repeatedly equated with the disestablishment of areas of original Indian Reservations in each of its modern cases. *Seymour* at 354-355; *Mattz* at 504, n.22; *DeCoteau* at 446; *Rosebud* at 589; *Solem* at 470.

On the floor of the House, Congressman Sutherland explained that because of the Ute legislation, an appropriation for another survey of the boundaries of the original Reservation would be "entirely useless." 36 Cong.

Rec. 1388 (1903), LD 90.[2] The *Rosebud* legislation was specifically cited, relied on, and adopted by Congress in finalizing the manner of entry. S. Rep. No. 4240, 58th Cong., 3d Sess. at 15-16 (1905) LD 102. At the time, Interior Inspector McLaughlin also explained the legislation to the Utes in open council in terms that everyone clearly understood ("Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this Reservation"). Minutes of Councils with Uintah and White River Indians at 42 (1903) JX 162 (Duchesne Brief App. 368a).

Immediately after the Act was implemented, the Commissioner of Indian Affairs expressly stated that the Ute legislation "restored the area to the public domain". Annual Report of the Commissioner of Indian Affairs at 147 (1905), JX 323. In 1906, when President Roosevelt had occasion to revisit the issue one year after his 1905 Proclamation formally opening the Reservation (which recited the "public domain" language of the Ute legislation), he further described the area as the "*former*" Uintah Indian Reservation and one additional small tract theretofore reserved was similarly "*restored to the public domain*" in this 1906 Presidential Proclamation. Proclamation of September 1, 1906, 34 Stat. 3228-3229 LD 132. From the beginning, Congress shared this view and variously described the area, whenever the occasion arose, as "heretofore a part of the Reservation", 40 Cong. Rec. 1064, 1332 (1906) LD 116; S. Rep. 139, 59th Cong., 1st Sess. 1 (1906) LD 117; H.R. Rep. 291, 59th Cong., 1st Sess. 1 (1906) LD 119; Act of Jan. 27, 1906, 34 Stat. 9 LD 120, "formerly" a part of the Reservation, Act of July 20, 1912, 37 Stat. 196 LD 145,

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[2] The record on appeal includes a Joint Compendium of Legislative Documents and Joint Exhibits, which include Executive Orders, President Proclamations and certain Secretarial Orders, compiled and used by the District court. In addition to formal citation form, these sources are referred to parenthetically by their corresponding index numbers, LD 1 to LD 217, and JX 1 to JX 485. *See, Ute Indian Tribe*, 773 F.2d at 1094, n.2, and *Ute Indian Tribe*, 521 F. Supp. at 1080, n.17.

or within the "former" Reservation in so many instances that excerpts alone fill pages of Appendices. Duchesne Brief App. 408a. Administratively, there are references in every decade that the area in question was "restored to the public domain" and as such was within the "former boundaries" of the original Uintah Reservation, by various officials of the Department of Interior and Office of Indian Affairs. Joint Report by Special Inspectors to the Sec. of the Interior, contained in H.R. Doc. No. 892; 62d Cong., 2d Sess. 1-2 (1912) LD 146; Dept. of the Interior Memorandum from Finney to Howell at 1 (October, 1912) JX 359; Letter from Sec. of the Interior, contained in H.R. Doc. No. 1250, 63d Cong., 3d Sess. 2-3 (1914) LD 149; Letter from Commr. of Indian Affairs at 1, (June 19, 1941) JX 450; Opinion of Interior Solicitor, 59 I.D. 393 (1947) JX 454; Memo from Solicitor at 2 (Nov. 18, 1964) JX 469; Secretarial Order, 36 Fed. Reg. 19920 (1971) LD 210. As early as 1917, County boundaries were also defined with specific reference to the "boundary of the former Uintah Indian Reservation. Utah Code Ann. §§ 17-1-10, 17-1-27.

As recently as 1957, in the Court of Claims, the United States and the Uintah Indian Tribe formally stipulated that the "1902 Act, as amended" *restored the Uintah Reservation* to the "public domain" and that it was in fact a "former" Reservation. Stipulation at 10, 14, 15, *Uintah and White River Bands of the Ute Indians v. United States*, 139 Ct. Cl. 1 (1957), JX 455. (Counties Brief in Support of Petition App. 1a). And this concession was, as one would expect, consistent with other admissions of the Ute Indian Tribe that repeatedly recognized a Ute Reservation consisting of one million acres of trust lands, and not the four million acres within the original Reservation boundaries of their present claim. Even the United States, subsequent to the *en banc* decision of the Court of Appeals, now openly concedes that part of this Ute claim should not be sustained. Brief of the United States as *Amicus Curiae* at 20-21, *State of Utah v. Ute Indian Tribe*, U.S. Sup. Ct. No. 85-1821, *cert. denied*, 479 U.S. 994 (1986).

Even without a proper historical perspective or a review of the arguments previously presented and rejected, *a fair reading* of *Seymour, Mattz, DeCoteau, Rosebud*, and *Solem clearly sustains* the views set forth in the opinion in the Utah Supreme Court. However, as historians and other commentators are quick to point out, if the confusion and contradiction that seemingly runs through this area of the law is ever to be clarified, set straight, and properly focused, more is required here.[3] App. 1a-57a. Another three decades of litigation rehashing issues substantially settled for a century consistent with that historical understanding, benefits no one. Yet, as the *Amicus* Brief of the Navajo Nation attests, that is precisely what the future promises—unless this Court in this case authoritatively reconciles these conflicts consistent with the intent of Congress a century ago—a difficult task to be sure, but one made somewhat easier by the lessons learned since this Court was first presented with this issue in 1962. *Seymour, supra.* With this purpose in mind, *Amicus* County starts with a brief review of the primary arguments presented and rejected in each of these cases and the historic perspective available or established at the time.

Such a review establishes two essential points. First, as one would expect, each time the Court was subsequently presented with this issue more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. Secondly, the United States be-

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[3] *See* Campbell, Reservations: *The Surplus Lands Act and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57 (1984); David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U. L. Rev. 1247. Also, *see*, Herbert T. Hoover, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era*; LeAnn Larson LaFave, *Congressional Intent Regarding Jurisdiction on Ceded Indian Land During the Allotment Era Part II: The Law*, Papers presented to the Western History Association, October 1986, reprinted in this App. 1a-57a.

cause of its inflexible "litigation position" in support of a recognition of the original Reservation boundaries in each case (disregarding the historical record, the intent of Congress and other legitimate governmental interests) has not made any positive contribution to the process. In fact, the shifting but very sophisticated arguments of the United States, in large part have served to perpetuate the confusion and conflicts in this area of Federal Indian law, making additional litigation even more certain. For this reason, the central arguments of the United States are specially tracked. The briefs of the United States in each of the first four cases are set forth verbatim in App. 58a-154a.

II. THIS COURT HAS CONSISTENTLY RECOGNIZED THE SIGNIFICANCE OF PUBLIC DOMAIN TERMINOLOGY IN THE OPERATIVE LANGUAGE OF SIMILAR GENERAL ALLOTMENT ACT STATUTES AND THE UNITED STATES HAS CONSISTENTLY AGREED WITH THIS VIEW.

A. *Seymour v. Superintendent*, 368 U.S. 351 (1962). We start with *Seymour v. Superintendent, supra*, when this issue was first presented to this Court. Although we now know that the 1906 Colville Act at issue was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act), a routine matter for Congress by 1906, neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. The *Seymour* Opinion does not cite the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, LD 13, or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought. In short, *Seymour* was decided *almost* without the benefit of any historical perspective—almost because while neither the General Allotment Act nor the legislative history of the specific Act in question played any role in the decision, Petitioner did rely on the contrast between the 1906 Act and earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Brief for Petitioner at 10, *Seymour*. At best, this was a limited perspective but certainly one that benefited Petitioner by simple contrast. The fact that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement because of the questionable nature of the title to the Colville Executive Order Reservation and a Congressional concern that undesirable precedent might be recognized, was not briefed or discussed. *Antoine v. Washington*, 420 U.S. 194, 213 (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892); *see also, U.S. v. Pelican*, 232 U.S. 442 (1914). Nor was it mentioned that the 1906 Act was actually preceded by another similar cession agreement. In any event, it is doubtful if any of the above would have altered the views of the United States, arguing in support of the Reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court.") *Seymour* at 357.

The Solicitor General's three page argument was based almost entirely on the 1948 statutory definition of Indian Country, which, of course, begs the question and upon *subsequent* Congressional recognition, primarily in 1956, that the Reservation continued to exist. Memorandum for the United States, App. 59a-60a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as noted *supra*, was not even mentioned in

Seymour) in an attempt to attribute to both *Seymour* and the General Allotment Act a new Congressional plan or purpose consistent with a new argument that no surplus land statute passed pursuant to the General Allotment Act of 1887 was ever intended by Congress to disestablish portions of Indian Reservations.

The United States keyed on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it . . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888) LD 15. No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process—at least in the absence of some affirmative persuasive evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at that time—or, as a matter of fact, ever.)[4] The first opportunity for the United States to advance the new General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* Brief for the United States, App. 72a.

B. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep

[4] There is no such evidence since most Congressmen from Western States intended the same results: reservation disestablishment.

of *Seymour* tied to the General Allotment Act in this respect, their position met with only limited success. Brief of the United States, App. 71a-72a. The history of the Klamath River Reservation at issue in *Mattz* was so tortuous and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision. Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> Because of the *General Allotment Act* and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the *General Allotment Act* or special Acts, do not in themselves terminate the reservations. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

Brief of the United States, App. 67a, 71a, 72a, 81a (emphasis added). *See also*, App. 68a, 72a, n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

Transcript of Oral Argument at 19, *Mattz*. *See also,* Oral Argument at 13, 14, 15, 20, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished Indian reservations. According to the United States, the Court could then, by contrast, look to these examples in determining when Congressional action was really intended to disestablish an Indian reservation—an instant historical perspective of sorts. Brief of the United States, App. 75a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a Congressionally mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things,

> This Court's more recent decision in *Seymour v. Superintendent,* 368 U.S. 351, is, in our view, controlling here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the *absence* from the Act of language abolishing the reservations *or "restoring that land to the public domain"* (368 U.S. at 355).

Brief for the United States, App. 81a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument. Brief for the United States, App. 75a.

At oral argument, the United States repeated the point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Transcript of Oral Argument at 20-21, *Mattz*.

Because the "absence of the public domain language" example, *supra*, figures prominently in the construction of the *Ute* legislation, this aspect of the "by contrast" argument also deserves special emphasis and further attention. For this reason, it is excerpted separately in the discussion and notes *infra*. For the most part, the other examples do not merit further discussion. The text *infra* establishes that they were representative of extreme and atypical situations encountered by Congress only on rare occasions and decades apart.

Without question, the *Mattz* opinion reflects both arguments. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958) . . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356.

Mattz at 496, 497.

Secondly, with respect to the "by contrast" argument (specifically including the "absence of public domain language" example of the United States), the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms.[22] . . .
>
> [22] Congress has used clear language of express termination when that result is desired. See, for example, *. . . 27 Stat. 63 (1892) adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation (. . . be, and is hereby, vacated and restored to the public domain"),* and *Seymour v. Superintendent,* 368 U.S., at 354; 33 Stat. 218 (1904).

Mattz at 504, n.22 (emphasis added).

When this Court, a short two years later, was really presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act, with all of the supporting documentation of both the specific Act as well as the General Allotment Act, the General Allotment Act dicta in *Mattz* did not dissuade this Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Predictably, the United States again argued forcefully in *DeCoteau* for a different result.

C. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *In DeCoteau*, the surplus land statute at issue was one of eight similar agreements jointly ratified in an 1891 Appropriation Act, each of which was specifically tailored to the provisions in the General Allotment Act, which had just been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the affect the agreements were understood and intended to have. And for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, that set forth a complete and proper historical perspective.[5] That perspective established that while simple allot-

[5] For example, in 1892, the Commissioner of Indian Affairs confirmed:

> The policy of the Government, *rendered fixed and definite by the passage of the severalty law in 1887*, had for its object the twofold purpose of allotting lands in severalty, with the view of stimulating the individuality of the Indians and promoting their personal prosperity, *and also of rendering available for white settlement vast areas of surplus lands not needed by the Indians. Indian lands restored to the public domain and thrown open to white settlement* under the homestead law. . .

S. Rep. No. 57, 53d Cong., 1st Sess. at 2-5 (1893) (LD 26) (emphasis added).

ment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* on the date of the opening set forth in the Presidential Proclamation, precisely in the same manner that pre-1887 enactments had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation and instead, urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that Act, and that no Act pursuant to the General Allotment Act, according to the United States, was ever intended to effect reservation disestablishment except at some future point in time (again, as in the Brief for the United States in *Mattz*, blurring the distinction between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations *and* surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result.) The United States said:

> The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public domain, and its repeated references to the *General Allotment Act* show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour v. Superintendent*, 368 U.S. 351, and *Mattz v. Arnett*, 412

U.S. 481, show that this limited purpose is consistent only with preservation of the Reservation as a jurisdictional unit. . . .

. . . The Agreement, in its preamble, twice states that it is made under the authority of the *Act of February 8, 1887, the General Allotment Act,* and quotes from that Act. . . .

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the *General Allotment Act.* The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, ...

It was not the purpose of the *General Allotment Act* to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction. *Seymour v. Superintendent,* 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra,* 412 U.S. at 497, quoting from *Seymour, supra*: . . . .

> In sum, while the *General Allotment Act of 1887* provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system . . .

Brief for United States, App. 92a, 94a, 95a, 96a.

At oral argument, the United States pressed the same points.

> MR. SACHSE: . . . And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the *General Allotment Act.* . . .
>
> MR. SACHSE: . . . If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent,* . . . .

Transcript of Oral Argument at 11, 21, *Erickson v. U.S. ex rel. Feather,* U.S. Sup. Ct. No. 73-1500, *decided with DeCoteau v. District County Court,* 420 U.S. 425 (1975). *See also* Oral Argument at 13, 17.

In addition, the United States submitted a series of very sophisticated arguments from little scraps of language in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication could, however, overcome the problem the United States never addressed. Namely, all of the contemporary historical evidence undisputedly pointed to the opposite conclusion.

For example, even Senator Dawes himself made the point in the *DeCoteau* debate and the *DeCoteau* Court set forth his remarks at length:

> "The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All of this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler . . ."
>
> Remarks of Sen. Dawes, *id.,* at 3879 (emphasis added). *DeCoteau* at 441.

Nor was there any doubt that Sec. 5 of the General Allotment Act was the linchpin of the entire process. The *DeCoteau* documents referred repeatedly to this aspect of the General Allotment Act. Brief for the Respondent at 72-113, *DeCoteau.* And the Court in *DeCoteau* specifically recounted this fact in the text of the *DeCoteau* opinion:

> *In 1887, the General Allotment Act (or Dawes Act)* was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands.[10] The Act . . . *Against this background,* a series of negotiations took place in 1889 with the

objective of opening the Lake Traverse Reservation to settlement.

> . . . the Secretary of the Interior a set of draft instructions for the guidance of a Commission to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands.[13] *The instructions noted that the negotiations would be pursuant to § 5 of the General Allotment Act, . . .*

DeCoteau at 432, 434 (emphasis added). Also see *DeCoteau* at 436, 438, and 441.

In addition, the cession format utilized by Congress in previous decades (with the end result never questioned in terms of reservation boundaries), was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States now said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted *supra* was compiled by the United States and noted in *Mattz* at ~~497, n.19~~. In the original version of the list presented to the Court in *Mattz,* the United States had included representative cession language. Brief of the United States, App. ~~79a, n.18.~~ When that example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and then argued throughout *DeCoteau* that cession language was meaningless. Brief of the United States, App. 97a.

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession Agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e., after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and

the remainder of the sophisticated arguments of the United States were noted and rejected for that reseason. *DeCoteau* at 445.

In addition to clearly rejecting the revisionist General Allotment Act argument of the United States, *DeCoteau* also sheds further light on the significance of public domain terminology. The United States continued to equate public domain terminology with reservation disestablishment, the foundation of the "by contrast" argument. In order to argue against disestablishment in *DeCoteau,* however, that support was qualified by insisting that the public domain terminology appear on the face of the Act (a particularly significant position in any event, in light of the face of the *Utah* legislation). In this fashion, the public domain argument was featured foremost in the brief for the United States:

> SUMMARY OF ARGUMENT . . . The 1891 Act did not specifically change the boundaries of the Reservation *or return land to the public domain,* . . . The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, *returned to the public domain,* or set aside for settlement.
>
> THE ABSENCE OF LANGUAGE IN THE 1891 ACT EXPRESSLY ALTERING THE BOUNDARIES OF THE RESERVATION OR *RETURNING LAND TO THE PUBLIC DOMAIN* SHOWS THAT THE RESERVATION BOUNDARIES WERE NOT ALTERED
>
> In a footnote, the Court gave the following examples of termination language [*Mattz, supra,* 412 U.S. at 504, n. 22]:
>
> > 2. *27 Stat. 63 (1892) (* * * the North Half of the Colville Indian Reservation "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").*

> There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "*vacated and restored to the public domain.*" The reservation lines are not abolished.
>
> First the "cession" is not an outright *return of the land* to the public domain . . .

Brief for the United States, App. 91a-92a, 95a, 97a, 98a (emphasis added).

In oral argument, the United States started off by attempting to make this modified argument, again using the 1892 *Colville,* "restore to the public domain" example to illustrate the point.

> MR. SACHSE: There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation. You've heard some talk about the public domain. What's important in this Act is there is no language saying that this was returned to the public domain . . . .
>
> QUESTION: But, as a matter of fact, it's treated as the public domain.
>
> MR. SACHSE: I—I don't know what you mean by that.
>
> QUESTION: Well, what happened after the ceded property?
>
> MR. SACHSE: After the property was ceded,—
>
> QUESTION: Yes?
>
> MR. SACHSE: —the government sold that land under—
>
> QUESTION: Treated it like the public domain.
>
> MR. SACHSE: Well, only in the exact same sense that it—
>
> QUESTION: Well, it was handled as part of the public domain by the same system that the public domain was handled.

> QUESTION: Weren't they acting for the Indians?
>
> MR. SACHSE: That is to say—and I'll try to get this in the—I think I may do better to break it down into historical perspective.

Transcript of Oral Argument at 11-12, *Feather.*

The historical perspective the United States then relied on was a quick reference to the "actual dynamics" of *Seymour* and *Mattz.* As *DeCoteau* attests, this historical perspective was clearly not persuasive.

The *DeCoteau* Opinion frames the issue in terms of whether the Lake Traverse Reservation was disestablished "and returned to the public domain" by the 1891 Act. *DeCoteau* at 426-427. Respondent's question presented included similar phraseology ("disestablished said reservation and restored the lands to the public domain"). Brief for Respondent at 2, *DeCoteau.* References to the public domain concept appear throughout the *DeCoteau* documents and the opinion of the Court significantly sets forth representative excerpts in extended quotations (i.e. the "surrender of a large portion of their reservations to the public domain" and the "All this land is opened by this bill to settlement as part of the public domain." remarks of Senator Dawes, *DeCoteau* at 425).

In addition, there is no question that the Court in *DeCoteau* relied on the statements of the sponsors as well as the "public domain by contrast" example previously advanced by the United States in *Mattz.*

> That the lands ceded in the other agreements were *returned to the public domain,* stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. *The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."* See *supra,* at 440-441. Cf. *Mattz v. Arnett,* 412 U.S., at 504 n.22 [Listing 1892 *Colville* "public domain" statute.]
>
> In *Seymour,* the Court *sharply contrasted* the 1906 Act, which provided only for non-Indian settlement,

> with an 1892 Act, which plainly " 'vacated' " and *restored " 'to the public domain' "* the northern portion of the Colville Reservation. *Seymour v. Superintendent,* 368 U.S., at 355. *The 1891 Act before us here is analogous to that 1892 statute.*

DeCoteau at 446, 448-449 (emphasis added).

In this respect, the United States did contribute something to the process. *DeCoteau* confirms and makes clear that the public domain concept, whether expressed on the face of the act or in the legislative history and surrounding circumstances, should be equated with reservation disestablishment. The *Ute* legislation qualifies in both respects.

D. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). Subsequent to *DeCoteau,* the United States resisted the force of the decision as if *DeCoteau* had never been decided. In 1977, when this Court was presented in *Rosebud Sioux Tribe v. Kneip,* with three additional Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed, the United States again argued that after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz* as discussed *supra.* In the brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of the *General Allotment Act of 1887,* 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* . . .

Brief for the United States, App. 122a (emphasis in original text).

In the discussion of *DeCoteau,* the United States never even mentioned the role played by Sec. 5 of the General

Allotment Act in the *DeCoteau* process. Brief for the United States, App. 122a. According to the United States, *DeCoteau* was important primarily because of the differences between the Act there and the *Rosebud* legislation. Namely, the unilateral nature of the Congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed the revisionist theory of the General Allotment Act. *DeCoteau* was mentioned only in passing and then only to somehow support continued reservation boundaries throughout this period. Transcript of Oral Argument at 20, 21, 27, 29, *Rosebud.*

The *Rosebud* Court, again including the author of the *Mattz* opinion, rejected the arguments of the United States. And at the outset, the Court set forth the underlying section of the *Rosebud* legislation that controlled the process, which incorporated "verbatim" Sec. 5 of the General Allotment Act of 1887:

> § 12, 25 Stat. 892, . . .
>
> *This reproduced, verbatim the language of the General Allotment Act, § 5, Act of Feb. 8, 1887, 24 Stat. 389.*

Rosebud at 589, 590 (emphasis added).

Next, the Court made specific reference to the "familiar forces" noted in *DeCoteau* and the provisions of a 1901 Act that generally authorized the Secretary of the Interior to also set the process in motion. *Rosebud* at 590.

Then, the *Rosebud* Court proceeded, in the most definitive Opinion to date, to squarely address each and every argument, sophisticated arguments to be sure (and there were many), advanced in support of a Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud,* together with *DeCoteau* as historical background, establishes that the United States, the Petitioner and supporting *Amici,* have not advanced any arguments of substance since that have not already been

answered there. The Utah Supreme Court was on solid ground when it still looked to and relied on *Rosebud* for guidance in resolving similar questions involving the Ute legislation.

In light of the persistence of the United States with respect to Sec. 5 of the General Allotment Act, the position of the United States regarding the "by contrast" argument and the public domain example was similarly predictable. As in *DeCoteau,* the United States in *Rosebud* continued to equate public domain terminology with disestablishment, the foundation of the "by contrast" argument. In order to argue against disestablishment, in *Rosebud,* however, that support was even more qualified than in *DeCoteau.* Not only did the United States continue to insist that the public domain terminology appear on the face of the Act, but other arguments were also advanced to explain why Congress never technically restored the lands to the public domain even if Congressional documents repeatedly stated that this was the effect of the legislation. In this fashion, the public domain argument still featured prominently in the Brief for the United States.

> In the Act of March 2, 1889, Congress *'restored to the public domain'* (25 Stat. 896) one-half of the Great Sioux Reservation . . .
>
> The Acts of 1904, 1907, and 1910, do *not* demonstrate an intention to *return lands to the public domain,* and *the clear language of other Acts expressly restoring lands to the public domain is notably absent.*
>
> In 1892, the United States expressly vacated and *restored a portion of the Reservation 'to the public domain,'* 27 Stat. 62, 63.
>
> These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land *restored to the public domain. . . .*
>
> . . . this, the Court held, *restored the land to the public domain and extinguished the Reservation.* 420 U.S. at 446-447. But under the Rosebud Acts, the

> federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was *not first made part of the public domain, . . .*
>
> This is particularly true when, as here, *Congress* demonstrated quite clearly that it did *not intend to place the Indian lands within the public domain.*
>
> The language of the Acts themselves does not *disclose an intent to return land to the public domain. . . .*
>
> The 1904 Act nowhere provides that the Reservation was abolished or *that the lands were to be restored to the public domain. . . .*
>
> Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands.
>
> This reticence is in *marked contrast* to the *express language used by Congress in other statutes. . . .* 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservations * * * be, and is hereby, vacated and *restored to the public domain; . . .* See also *Mattz v. Arnett, supra,* 412 U.S. at 504, n.22.[12]

Brief for the United States, App. 113a, 118a, 120a, 123a, 125a, 126a. *See also* App. 128a, n.15, 130a, 137a (emphasis added).

Reference to the public domain concept also appears throughout the *Rosebud* documents. As the *Rosebud* Court noted at the beginning of the opinion, the very act that created the Rosebud Reservation, the 1889 Great Sioux Act, contained public domain terminology. *Rosebud* at 589.

Moreover, Congress most explicitly and repeatedly referred to public domain when implementing the state school land Grant. The *Rosebud* opinion specifically noted one representative passage where the Senate sponsor

described the process and it was set forth at length. 35 Cong. Rec. 1423 (1904); *Rosebud* at 600, n.21.

As in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was important in *Rosebud* and equated with reservation disestablishment.[6]

Additionally, *Rosebud* stressed that in each instance, the underlying premise was that "congressional intent" will control. *Rosebud* at 586. *Rosebud* also recognized *Seymour* and *Mattz* to simply stand for the proposition that the mere fact that a reservation had been opened to settlement would "not necessarily mean" that the opened area had lost its reservation status. *Rosebud* at 586-587. More importantly, *Rosebud* reaffirmed that *DeCoteau* established that reservation status could not survive in the face of a "congressionally manifested intent to the contrary." *Rosebud* at 587. While *DeCoteau* also specifically established that surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act were, after 1887, intended by Congress to accomplish that result (*DeCoteau*), *Rosebud* made clear that Congress never intended to alter that fundamental understanding when, pursuant to Sec. 5 of the General Allotment Act in the *Rosebud* legislation noted *supra*, Congress continued to enact *similar* legislation throughout the first decade of the twentieth century. Although Congress altered the manner of direct payment in the early 1900's and relied on its plenary power in Indian affairs, affirmed by this Court in 1903 in *Lone Wolf v. Hitchcock*, 187 U.S. 553

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[6] With respect to public domain, the brief of *Amicus Ute Indian Tribe*, at 16, n.20, quotes *Rosebud* in the following manner:

> . . . this Court's counsel that 'the question of whether lands are in the public domain is separate from the question of intent to disestablish.' *See, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604 n.27 (1977).

The *Rosebud* note 27 in United States Reports states:

> . . . the question of whether lands became public lands is separate from the question of intent to disestablish. . .

Rosebud at 604, n.27.

(1903), as the *Rosebud* Court explained at length, neither of these changes altered that fundamental Congressional understanding. *Rosebud* at 598-599, n.20.

With respect to the changed method of payment (payment from the homesteader to the United States in trust for the tribe rather than from the United States directly to the tribe in trust), the *Rosebud* Court correctly found "no indication that Congress intended to change anything other than the form of, and responsibility for, payment." Earlier, the Court had cited with approval the Court of Appeals' view:

> As the Court of Appeals noted, and as all parties appear to agree, "[t]he problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money." 521 F.2d 87, 94.

Rosebud at 591, n.10.

With respect to the unilateral nature of the Congressional enactment, the Court set forth the relevant passage of *Lone Wolf*, specifically relied on by Congress at the time. *Rosebud* at 594.

Moreover, one should have expected that these changes would, over time, result in a new format for the Sec. 5 surplus land statutes. And this was in fact the case. But importantly, as *Rosebud* also establishes, the changes were not intended by Congress to alter the fundamental policy of disestablishment, then in effect for nearly two decades. With consent no longer Congressionally required, Sec. 5 surplus land statutes in this cession format (1887-1905) were soon modified. *Rosebud* at 598. After that, the format was utilized only when consent was readily obtainable in council and then only to evidence an informal understanding. *Rosebud* at 607, 612. Thereafter, by 1907, a new format was routinely adopted where, as *Rosebud* also attests, the Secretary of the Interior was authorized to "sell and dispose of a portion of the reservation" (arguably strong language in perspective), with the balance of the provisions of each act modified to meet whatever the situation then required. *Rosebud* at 608.

The changes in the legislative format therefore reflect no change in Congressional intent. As the *Rosebud* opinion and the *Rosebud* documents attest, this is not merely an arguable point, but an historically documented fact. To be sure, these changes altered some aspects of the nature of the discussion and the transaction. But it mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States,* 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous . . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud at 597.

And it mattered little that payment in trust, rather than directly from the United States, would create a lingering beneficial interest in the opened lands until settled on or otherwise disposed of, such as that recognized in *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920). For, as the *Rosebud* Court correctly affirmed:

> This preceding status could exist even if the lands were disestablished from a reservation. *United States v. Pelican,* 232 U.S. 442, 449 (1914); cf. *Ash Sheep Co. v. United States,* 252 U.S. 159, 166 (1920). As recognized by the Court of Appeals, "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape,

> and boundaries." 521 F. 2d, at 102. The question of whether lands become "public lands" under *Hitchcock* and *Ash Sheep,* is therefore, logically separate from a question of disestablishment. *United States v. Pelican, supra.* As the issue is not before us, we need not decide whether or not the lands became "public lands."

Rosebud at 601, n.24.[7]

In the final analysis, *Rosebud* establishes that the Sec. 5 Surplus Land Statutes, even as subsequently modified in *Rosebud,* were intended by Congress to disestablish reservations. Contrary to the repeated submissions of the United States, supported only by citations to *Seymour* and *Mattz* and other undocumented arguments, Congress never intended either the General Allotment Act or the subsequent changes in format to alter this fundamental concept of the entire process. In the absence of some statute, Senate report or House report, or other conclusive evidence of such a congressional purpose, which has never surfaced to date, this *Rosebud* perspective is the one that should be controlling here. The Ute legislation parallels the *Rosebud* legislation in both time and substance. Nothing in the opinion of this Court in *Solem v. Bartlett, supra,* in which a subsequent statute was construed, was intended to detract from that established historical perspective.

E. *Solem v. Bartlett,* 465 U.S. 463 (1984). In *Solem,* the United States combined and restated so many variations of both of these arguments that even a summary

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[7] Indeed, this lingering beneficial interest was undoubtedly "logically separate" from the question of disestablishment. The underlying facts in *Ash Sheep* subsequently established that the act at issue in *Ash Sheep* which created the lingering beneficial interest there, for reasons peculiar to the location of the Crow Reservation, described new diminished reservation boundaries and specifically delineated and separated the "ceded area" with the lingering beneficial interests, from the contiguous block of unceded land, designated "the diminished Crow reservation." *Little Light v. Crist,* 649 F.2d 682 (9th Cir. 1981); *Montana v. Crow Tribe,* 819 F.2d 895 (9th Cir. 1985), *summarily aff'd* 484 997 (1988).

review is difficult to present in context. Moreover, since the United States did not participate in oral argument, that abbreviated source is simply not available. In short, it can fairly be stated that the United States argued whatever was necessary to resist reservation disestablishment once again in *Solem*. Although inaccurate and half-true in many respects, according to the United States, these arguments made clear that some surplus land statutes passed pursuant to the General Allotment Act were intended by Congress to disestablish portions of Indian reservations (a significant concession) and others, even if so intended, should not be so construed by the Court at this point in time, unless the subsequent settlement of the area was pervasive. *Solem* essentially reflects the same sentiment.

Beyond that, *Solem* is also important here because of the one very significant aspect of the public domain argument specifically set forth in *Solem* that the United States, Petitioner and supporting *Amici,* consistently avoid or otherwise ignore. In conclusion, it bears repeating, especially in the context of this brief.

The fundamental error of the *en banc* majority centered around a misconstruction of *Solem* regarding the significance of the public domain terminology. Up front, *Solem* specially referenced public domain terminology in conjunction with other operative language that strongly suggested disestablishment and the *en banc* majority missed the point. *Solem* at 470, citing *Seymour* at 355 (restored to public domain language). Instead, the *en banc* majority focused on a footnote in that portion of the *Solem* opinion directed only to miscellaneous provisions in the balance of the *Solem* Act. *Solem* at 474-475. Even there, the *en banc* majority simply painted *Solem* with too broad a brush.

CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONGRESSIONAL INTENT REGARDING JURISDICTION ON CEDED INDIAN LAND DURING THE ALLOTMENT ERA: HISTORY

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Conflict regarding the prerogatives of tribal governments on Indian reservations has escalated steadily in recent years. Some resident tribal enrollees have complained to outsiders. "THE U.S. CONSTITUTION STOPS HERE," was the headline of a series about Red Lake Reservation in the *Minneapolis Star and Tribune.*[1] Indian courts were "islands of injustice," wrote investigative reporters. Reservation residents were not represented by qualified counsel. Ill-trained judges ordered, and self-serving politicans enforced, penalties for alleged infractions to satisfy personal interests. Their Red Lake constituents were either driven into exile out of fear, or stripped of opportunities and possessions, "with almost nowhere to turn" for help.

The problem was not restricted to Ojibway Country, the reporters added. On 487 reservations scattered across the country, many Indians were threatened by the loss of justice due them as citizens of the United States without recourse, and most reservation residents were deprived of economic opportunities because "businesses . . . important to the well-being of reservation economies" were "scared away by unjust and incompetent tribal courts." "Federal judges refuse[d] to hear appeals." "Congress . . . failed to pass laws curbing abuses," even though it held constitutional "authority over Indian tribes," and the Bureau of Indian Affairs had "powerful leverage" to enforce federal laws with "the $1.4 billion it dispenses annually for tribal governments."

As they championed the rights of Indians who lived under the jurisdiction of tribal governments, the Minneapolitans were left with the embarrassing conclusion that reservation leaders were not competent to govern without federal supervision. Their escape from the charge of racism was a ploy used often by outside observers who breeze through Indian Country. To blame were not self-

[1] January 4-7, 1986.

serving tribal politicans, after all, but "the long history of white men's exploitation of Indians."

Cultural self-condemnation did not assuage the resentment of Oglala Sioux journalist Tim Giago. From his *Lakota Times* office at Pine Ridge, he wrote not only in defense of the chief judicial officer at Red Lake, but also in protest against non-Indian journalists who passed judgment on reservation societies. Using news releases about Wounded Knee-1973 and Red Lake-1986 as prime examples, he accused uninformed Whites of calling Indians incompetent without justification, failing to give the victims of journalistic condemnation a chance to respond, and reaching erroneous conclusions that impaired the opportunities of all tribal members. "It is patently wrong for white reporters to overlook the ancient customs and laws of the much older tribal governments" when appraising the applications of justice, wrote Giago. And he challenged the authority of the United States to intrude, contending that its Constitution was "not the law of the land on the sovereign Indian nations."

At the end, Giago employed a tactic used often by Indians to escape the charge of racial bias for the blanket condemnation of White people. To blame for problems on the reservations was not abuse by non-Indians in general, but erroneous judgments by White historians in particular, who persist in teaching that Indians were "uncivilized savages when the white man first arrived." [2]

More troublesome still than conflict about the affects of tribal governance on Indians has been distress regarding judicial sanction for tribal jurisdiction over White people who live within the original boundaries of Indian reservations. While weighing arguments about the civil authority of Indians submitted by tribal lawyers and federal spokesmen against counter arguments advanced by counsel for state or local governments, federal judges have ruled indecisively on one side, then on the other.

[2] Sioux Falls *Argus Leader*, March 30, 1986.

Non-Indians have felt betrayed by attacks against state and local authority that has worked for them through several generations. They have complained that tribal governance might deprive them of time-honored constitutional guarantees. (See Appendix A) Indian leaders have asked why White people, who have managed their affairs for so long in the past, could not live under tribal authority in years to come.

Consternation escalates partly because of legal implications, and more due to inevitable economic consequences. At issue in Sioux Country during the summer of 1986 were tribal ordinances designed to ease Indian unemployment in excess of eighty percent on reservations with the preferential hiring of tribal enrollees on federal road projects, which have been accomplished mainly by Whites in the past. South Dakota Governor William Janklow took exception with a challenge to the legality of a special tax to fund the training of prospective Indian road workers.[3] At issue in the summer of 1986, too, was whether Pine Ridge Reservation residents should purchase Oglala tribal or South Dakota state license plates for their automobiles; and whether federal, state or tribal jurisdiction should prevail in the regulation of tribally operated bingo halls, which have been under investigation for possible corruption by crime syndicates.[4] In these instances, increasing intercultural antagonism between the families of persons seeking jobs, on the one hand, and friction between state and tribal officials in search of revenues, on the other hand, will be inevitable results.

Because tribal jurisdiction has so many potential applications of practical and economic consequence, no federal action to restrict or expand it will satisfy both tribal members and White people. At the grass roots, they are ever at odds, and express divergent opinions regarding how the conflict should be resolved. Most non-Indians

[3] Sioux Falls *Argus Leader*, July 22, 1986.

[4] Sioux Falls *Argus Leader*, July 27, September 16, 1986.

and some relocated mixed-bloods believe that tribal government if not the entire reservation system ought to be abolished. Nearly all Indians who occupy allotments or derive noteworthy benefits from reservation affiliations contend that reservation life under tribal authority is essential to cultural survival, but they disagree about the prerogatives tribal leaders ought to retain. A Yankton Sioux of Rapid City, who served more than three decades in the U.S. Indian Field Service, thinks tribal authority should be restricted to the management of Indian land.[5] Another Yankton, who devotes his life to the study of tribal history, has a different opinion. The subordination of tribal to White governance across Indian Country has been unjust all along. Within reservation boundaries, tribal leaders should govern without any constraint except the obligation to honor the presence of Whites. As national ctizens, they should be at liberty to live and own property within reservation boundaries. But those who cannot adjust to tribal regulations should be encouraged to relocate (possibly with assistance from voluntary relocation and employment assistance programs at federal expense), and all who resist the authority of tribal officials openly should be removed.[6]

Controversy in dialogue has led to action by officials, which has further aggravated and perplexed the victims of the dispute. Many adversaries have reached agreement in the belief that a definitive answer which factors either Indians or Whites would be better than the continued escalation of the controversy. Already, at least one tribal policeman has resigned because "nobody could tell him where on the reservation he could arrest suspects and enforce Indian laws."[7] White and Indian reservation

[5] Personal interview with Harold Shunk by the writer in Pierre, June, 1986.

[6] Personal interview with Leonard Bruguier by the writer at Vermillion, August, 1986.

[7] Personal interview by the writer with former policeman who prefers anonymity, July, 1985.

residents have grown increasingly suspicious of each other through debates about theoretical questions they barely understand, and practical issues that affect them directly. Federal judges have floundered in the contents of briefs and testimonies containing incomplete or faulty informamation. Attorneys have grown antagonistic about the erratic behavior of the courts, and increasingly intolerant of the performance of researchers who have worked as consultants on jurisdictional cases, with some justification. All public historians have not called Indians "uncivilized savages," as Giago has charged, but some have done jurisdictional research in violation of standards that govern their profession. Out of indolence, incompetence, or commitment to social causes, all too many historical consultants have skirted the grueling pursuit of truth in contexts and data to fashion selective information into polemical instruments for use in a righteous effort to make up for past inequities.

One historical consultant who supplied information for jurisdictional litigation pertaining to a Sioux reservation either stumbled into files that supported his sense of fair play, or gathered evidence selectively by design, and permitted its use to demonstrate congressional intent to sustain tribal authority within original reservation boundaries, even though the weight of evidence should have revealed the opposite was true. He either lacked competence, or abandoned the pursuit of truth for the role of referee on retribution as an advocate of one adversary in the judicial process. By doing so, the consultant confounded the proceedings of justice all the way to the Supreme Court of the United States.[8]

The decision in that case has muddled subsequent efforts to answer the central question in every jurisdictional investigation. It is this. Thruough the era between the passing of the Dawes Act in 1887 and its termination by the Indian Reorganization Act in 1934,

[8] *Solem v. Bartlett.*

did Congress mean to leave intact federal and tribal jurisdictional authority, or did it intend to disestablish the affected portion of the reservation? Because congressmen of that era left no cogent statements, historical consultants have presented selective passages from legislative and administrative records that pertain to intent. Attorneys have tourtured phrases here, and marshalled implications there, to support divergent postures toward how congressmen should have responded eighty or ninety years ago. Judges have listened to their arguments, mulled over conflicting precedents, reviewed legislative and administrative histories, even taken Indian-White population ratios into account, and from appearances relied excessively upon their own social values when reaching decisions.

From their inconsistent rulings has evolved intolerable confusion. How much better it would be to search for congressional intent in evidence regarding the behavior of administrative officials as they worked with congressional support and allocations on the management of Indian affairs while the Dawes Act was in effect. Using publications and documents that deal with the application as well as the formulation of federal policies, historians with impartial disposition should be able to extrapolate intent with limited margin of error.

In every case, they should review three things: (1) as background, JURISDICTIONAL POLICY FOR INDIANS from colonial times to the late nineteenth century, before many of the tribes moved onto reserves and accepted allotment and surplus land sales according to the terms of the Allotment Act of 1887; (2) the GENERAL PLAN OF FEDERAL INDIAN POLICY through the period 1887 to 1934, before the Dawes Act ceased to function; and (3) the AFFECT OF FEDERAL POLICY upon governance within reservation boundaries, where Indian Field Service officials managed agency affairs with congressional support.

Extraordinary developments in the histories of some tribes may lead to unique judicial decisions. But political

affairs on nearly all reservations evolved according to the same general plan. A historian who has kept up with the literature on federal policy toward Indians, and has labored in the records of a major federation of tribes for long, can present a scenario for the typical tribe that had a typical relationship with Congress through the era when the Dawes Act was in effect.

That historian should find it easy to trace JURISDICTIONAL POLICY FOR INDIANS down to the passing of the Dawes Act.[9] Sources at had reveal that general suppositions about the sovereign authority of Indian leaders to govern have been fairly consistent since the formulation of policy for this issue soon after the founding of Jamestown in 1607.

Jurisdictional Policy Prior to the Dawes Act

Throughout the colonial era, Anglo-American officials looked upon groups of Indians as political entities with title to land, which could be "quieted" only by purchase or conquest in war. Few White colonials proposed to ignore aboriginal claims or exterminate tribes as means of territorial acquisition. Like officials in England, they thought of areas occupied by Indians as the rightful possessions of their tribes; accepted the borders of Indian Country as boundaries within which Indian leaders exercized jurisdiction over tribal and diplomatic affairs; and negotiated often with tribal spokesmen by procedures in use for international deliberations between sovereigns of Europe. Similarly, Indian representatives dealt with Whites as they had with neighboring tribes through formal discussions in preference to war. The process of treaty making evolved almost naturally.

White diplomats were more aggressive than tribal spokesmen, for several reasons. There was a supposition

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[9] Francis Paul Prucha's *the Great Father* (Two Vols.; Lincoln: University of Nebraska Press, 1984) supplies the best general coverage of Indian policy from colonial times to 1980.

about universal rights to land in short supply explained by the European philosopher Emmerich de Vattel. He argued that sedentary, agricultural life was superior to diversified, semi-nomadic existence, assumed that "the earth belongs to all mankind" as a "common dwelling-place and source of subsistence," and contended that no component of mankind should appropriate more land than it could use if other parts were in need of space.[10]

Secondly, there was the belief shared by colonials regarding New World "discovery." A European sovereign whose agent staked first claim to a tract had the right of preemption over other European monarchs in competition for Western Hemispheric empire. It could be exercised as quickly and extensively as tribes relinquished claim by treaty, or lost it in war.

In addition, there was an assumption that sovereignty was divisible, and in the process of its reduction English monarchs had from might or other right acquired the greatest measure. Especially through divine ordination, they assumed dominion of supreme magnitude for themselves, and recognized sovereignty of second order in tribal governments.[11] To these inducements was added aggressive motivation from colonial assumptions about a Christian's mission and the capitalist's right of exploitation. Non-Indian colonials were hell-bent on expansion. Tribal groups and federations were bound to lose for their failure to act in concert.

In spite of this, colonials dealt often for land as though tribal spokesmen were their diplomatic equals. Until the 1750s, ranking officers in the several colonies were responsible for Indian diplomacy, or war, over land. Beginning in the 1750s, Superintendents of Indian Affairs did the work of diplomacy while British generals or

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[10] *The Laws of Nations or the Principles of Natural Law* (Washington, DC: Carnegie Institution, 1916), 37-38, 84-86.

[11] The official view of sovereignty is summarized in a note attached to the Land Law of 1796 printed in the 1861 edition of *Statutes at Large.* 4 *Stat.*, 465.

colonial governors were in charge of war. By the terms of the Proclamation Act of 1763, Parliament made clear the separation of land ceded for colonial use from Indian Country. Through the 1760s, surveyors fixed an approximate line near the crest of the Appalachian Mountains. Officially, there were two jurisdictions, and a non-Indian could not enter Indian Country legally without permission from British authorities.

During the American Revolution, many White people crossed demarcation lines illegally with the breakdown of British vigilance. But the Second Continental Congress vested responsibility for Indian affairs in central not state or local government. Adopting colonial practices without substantial change, national authorities dealt with tribes as sovereign entities, resumed negotiations, and supposed that non-Indians might not enter Indian Country without federal permission.

Congressmen who legislated under the Articles of Confederation from 1781 to 1789 perpetuated the same assumptions. They attended to the separation of Indian Country from land owned or occupied legally by Whites, prohibited the entry of non-Indians for trade or settlement without permission, and tried to arrange the legal entry of pioneers.

The restraint of non-Indians was not easy, because arable land available for expansion was in short supply.[12] Inevitably, the scarcity forced Confederation congressmen into action. Quickly, they dispatched negotiators to bargain for acreages already occupied by squatters on the northwestern frontier, and to confine the tribes to smaller areas. At the same time, they stipulated in the Northwest Ordinance of 1787 that land in Indian Country belonged to tribes until it was relinquished by the consent of their spokesmen.[13]

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[12] Howard Lamar, *The Reader's Encyclopedia of the American West* (New York: thomas Y. Crowell Company, 1977). A survey of early federal land policy appears on pp. 632-642.

[13] Greater detail about early national Indian policy is available in Prucha's *The Great Father.*

The Ordinance of 1787 also dealt with the issue of jurisdiction on ceded land, where it specified that "criminal and civil . . . laws shall be in force," and for their enforcement the Governor of a Territory shall "lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships." It went on to say that when a population reached 60,000 free inhabitants, a state "shall be admitted . . . on an equal footing with the original states, in all respects whatsoever" with liberty to "form a permanent constitution and State government."[14] One supposes that "in all respects" included the application of "criminal and civil laws" on land ceded by Indians. A blue print for the transfer of jurisdiction over White and relocated citizen Indians from tribal through federal to state authorities was in place.

When the authors of the Constitution of the United States added the power to deal "with the Indian tribes" to the other prerogatives of Congress, by implication they ordered the perpetuation of previous practices, and placed ultimate authority in the legislative branch. To the end of treaty making in 1871, administrators concluded diplomatic settlements by and with the advice and consent of the United States Senate, and implemented treaty terms with allocations approved by both houses of Congress. After 1871, business pertaining to Indian territorial ownership or transfer remained a legislative prerogative exercised through "congressional agreements." All along, congressmen were in charge of fundamental issues pertaining to land and jurisdiction.

With acreage in short supply across the upstart agrarian nation, no issue was more critical to early national leaders than was territorial expansion through the application of the Northwest Ordinance, followed by the acquisition of land from Indians. To keep White people

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[14] I *Stat.*, 50-53.

out of areas recognized as Indian Country until arrangements for transfer were complete, congressmen made tribal land inviolate to any except those who entered with permission from federal authorities when they drafted Trade and Intercourse Acts, beginning with that of 1790.[15]

Ceded land in public domain was processed for private entry first under the 1785 Land Ordinance, then through the 1796 Land Act and subsequent legislation. The attachment of a footnote to the 1796 Act in the 1861 edition of *Statutes at Large* not only summarized legal assumptions regarding sovereignty and jurisdiction, but also indicated their abiding application.

> Discovery constitutes the original title to lands on the American continent, as between the different Europeon nations . . . [and] the right of soil, which had been previously in Great Britain, passed definitely to the United States.
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> The United States, or the several states, have a clear title to all the lands . . . subject only to the Indian right of occupancy . . . . Whenever a tract of land has been once legally appropriated to any purpose . . . [it] becomes severed from the mass of public lands: and no subsequent law or proclamation, or sale, would be construed to embrace it. . . . A state has a perfect right to legislate as she may please. . . . But Congress are invested by the constitution with the power of disposing of public land. . . . Whenever the property is passed . . . [by federal laws, it] like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed, and was vested.[16]

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[15] 4 *Stat.*, 469-474.

[16] 4 *Stat.*, 465.

Down to 1861, Congressmen evidently thought it traditional and axiomatic that acreages acquired from tribes, and transferred to public domain for private entry under federal land legislation, fell under state jurisdiction. The same disposition was implicit in congressional action over the next several decades. National attention focused upon the industrial revolution in the East, which thrived on resources and services from hinterland economies in territories and states of the trans-Mississippi West. Immigrants entered freely under congressional legislation that screened new arrivals only for national origins and objectionable tendencies. Population grew by some 33,000,000 from immigration in only seventy-five years.[17] On frontier provinces acquired through Indian wars, treaties and congressional agreements, immigrants and citizens from the East who crossed the Mississippi River found ample space to settle on plots governed by federal land legislation, which was amended often to suit western conditions. After a lull in state making caused by post-Civil War partisan conflict, nine new western states entered the Union in less than a quarter century, beginning with four under an omnibus bill in 1889. The ceded land they contained passed from tribal through federal to state jurisdiction according to congressional policy. From appearances, no federal official said otherwise about the transfer of jurisdiction over ceded aboriginal land.[18]

General Application of the Dawes Act

All the while, Indian tribes were segregated from Whites on reservations managed by employees of the

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[17] Henry Steele Commager's piece about the impacts of immigration on the character of Americans in *Modern Maturity* (February-March 1986) contains this estimate for the period 1865 to 1940.

[18] For example, the Yankton Sioux surrendered aboriginal claim and jurisdictional authority on 11,155,890 acres in present-day South Dakota east of the Missouri river when they accepted recognized claim to 430,000 acres in the 1858 Washington Treaty.

U. S. Indian Field Service, wherein additional acreages were relinquished and opened for non-Indian settlement. Section 5 of the Dawes Act of 1887 created procedures whereby communal tracts they contained could be dissolved and allotted to individuals by executive action. With allotting agents at the scene—often in the presence of ill-qualified interpreters, irate tribal traditionalists, meddlesome missonaries, and troublesome White hangers-on-tracts deemed adequate for subsistence farming or ranching were parceled out among tribal members in severalty. Section 6 of the Act prescribed that on the completion of the "patenting of lands to said allottees" they would "have the benefit" and "be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." After tribal needs for allotments were satisfied, surplus areas could be "sold or released to the United States" by tribes "for the sole purpose of securing homes to actual settlers," whose example was to encourage agrarian interest among Indians. (This was the heart of the General Allotment Act.).[19] The United States either purchased surplus lands, or managed their sale piecemeal as rapidly as demand allowed. Proceeds went into tribal accounts to educate and sustain allottees and their families, who were expected to attain self-sufficiency from allotted or heirship land. On each reservation so administered, some Indians filibustered or protested rigorously at every stage in the application of the Dawes Act, but on most reserves a majority acceded to the plan, albeit under duress.

Historians of Indian-White relations understand that the applications of Sections 5 and 6 of the Dawes Act on most reservations failed miserably at the time. Reasons included the termination of treaty annuities, and depletion of tribal accounts, before self-sufficiency was attained; a disinclination by many Indians to take up farming and ranching full time; the infertility of acreages on allotments; land hunger among Whites; adverse climatic

[19] 24 *Stat.*, 388.

conditions; an inadequate land base; and the general discouragement of Indians about their increasing dependence on paternalistic regimes in charge of their reservations.

Students of the applications of the Dawes Act on western reservations know, too, how little Indian allotments have contributed to reservation economies since the Dawes Act was applied. Only three families in an enrolled population of more than 2,000 Yankton Sioux, whose administrative history is most familiar to the writer, attained self-sufficiency from their own land by the 1920s. Few more than that have relied mainly on farming and ranching for livelihood at any time over the past half century. The loss of land has been a principal cause. Collective Yankton acreage was reduced from 11,155,890 to approximately 40,000 acres in eighty years. By 1940, Yanktons retained recognized title to an area containing only 3.6 percent of the tract to which their predecessors ceded aboriginal claim.[20] On acerage, the other Sioux tribes fared little better.

Sensitive observers have looked back on this with deep regret and desire to somehow rectify a tragic error in the history of Indian-White relations. Surely, additional recompense beyond recent monetary payments through claims awards would be just. It should not be tailored by judges, however, or counsel, or expert witnesses, or historical consultants seeking retribution through jurisdictional adjudication. Recompense should be made through some other means, and jurisdictional disputes resolved by a search for congressional intent in developments related to the applications of state, federal and tribal governance within the same original reservation areas.

To the question of whether congressmen meant to leave federal and tribal jurisdiction intact throughout all lands contained by the original borders of their reservations, or

[20] Charles J. Kappler, *Indian Treaties, 1778-1883* (New York: Interland Publishing, Inc., 1972), 776-780.

intended to transfer jurisdiction from tribal to state and local governments over land ceded as surplus for entry by Whites within those boundaries, there is a reply by implication in most statements by congressmen and administrative officials regarding the general purposes of the Dawes Act. In various ways, Henry Dawes himself expressed the belief that "the time is not far distant when the holding in severalty will prevail all over this country among Indians as well as white men." [21] By this he surely meant to encourage de-tribalization. In 1905, the Acting Attorney General of the United States wrote: "Undoubtedly the ultimate purpose of the allotments provided by the Act of 1887 is to wipe out the reservations." His belief in the elimination of tribal governance was clear, and he added that "it is for Congress, and not for the courts, to say when that purpose shall take effect." [22] His view of "ultimate purpose" expresses the expectation of de-tribalization, and so do many other official opinions pertaining to the Dawes Act in that era. (See Appendix B) From a broad and general survey of JURISDICTIONAL HISTORY, an historian is likely to conclude that tribal jurisdiction over aboriginal land was ceded with title, and that tribal authority over land on reservations was considered a temporary expedient even on the acreages assigned to allottees.

Recent literature on the GENERAL GOAL OF FEDERAL INDIAN POLICY for that era bears a similar message. Policy reflected suppositions handed down from colonial times: Vattel's hypothesis; preemption rights to sovereignty and supreme dominion over tribes by the United States; and Christianity coupled with free enterprise economics as guiding features in federal goals. Field Service administrators and missionaries backed by congressional

[21] 49 Cong., 1 Sess., *Congressional Record*, p. 1559.

[22] "Authority of the United States over Indians—opinion of Acting Attorney-General," Department of Justice, Washington, D.C., May 35, 1905. The writer found this in Fort Peck Letter Books at the Federal Archive and Records Center in Kansas City.

support labored to transform Indian people into self-supporting citizens of the United States, to separate them from tribal ties, and to attach them to White institutions, including those of governance. Congressmen authorized as they funded these processes year after year with published information at hand regarding administrative efforts, and considerable instruction from lobbyists with influence they could not ignore. That congressmen knew the reduction of tribal authority was part of the general plan they authorized and funded is surely implied in appropriate chapters of Francis Paul Prucha's *The Great Father*, for example, and the text of William T. Hagan's *The Indian Rights Association*.[23] The latter indicates clearly that the imposition of mainstream beliefs and practices in place of Indian habits and philosophies in most of their manifestations was the goal of fawning eastern do-gooders with enormous influence among congressmen, and implies that the destruction of tribal authority was part of the acculturationists' plan all along.

Records pertaining to the AFFECTS OF FEDERAL POLICY on tribal governance within the reservations of Sioux Country, at least, suggest that the congressmen who listened to reformers could not have been blind to what was happening at the grass roots. For the contents of federal documentary holdings, mission files and other archival collections as well as secondary sources reveal that several forces were openly at work to undermine tribal governments through the period 1887 to 1934. (a) One important influence was the abiding erosion of legitimate tribal authority that had taken place through official action since the Age of Jackson. (b) Another force was the intensified program of acculturation instituted as the Peace Policy under Ulysses S. Grant. In support of these older commitments, (c) a third was a federal plan exercised in most agencies between 1880 and 1910 to supplant traditional tribal governments with Business Committees under the control of Agents and

[23] Tuscon: The University of Arizona Press, 1985.

Superintendents, who either manipulated their agendas or rendered them defunct by the outset of the 1920s.

(a) Relentless effort to undermine tribal authority from the Jackson era was a key to success in every de-tribalization effort while the Dawes Act was in effect. An early statement of intent to make this part of federal policy for trans-Mississippi tribes appeared in a plan for acculturation submitted by Saint Louis Superintendent William Clark to Secretary of War James Barbour, on March 1, 1826, in which he urged federal action to acculturate tribal members—among other things "to teach them to . . . establish laws for their government," and to gather in settlements "over which a competent agent should be placed with full power of conducting the executive part of a Government." [24] Soon a plan like this was implemented widely by U. S. Agents, U. S. Farmers and other regular employees of the Indian Field Service, with ever increasing effect.

(b) At considerable expense to tax payers and tribal accounts, the plan exercised by Jacksonians was enlarged and enforced on reservations under Ulysses S. Grant's Peace Policy. Field Service employees and missionaries labored with congressional encouragement and support to educate young Indians about non-Indian culture, to put them to work mainly as farmers and ranchers, to supplant individual attachments to tribes with ties to civil governments through citizenships and in the process to subdue if not dismantle traditional Indian governments. The application of these strategies culminated in a frenzy of citizenship awards and fee simple land issues followed by the depletion of tribal accounts with per capita payments. By the early 1920s, many grass roots observers thought de-tribalization for most Indians was nearly accomplished.

(c) The notion that men in Congress who flaunted mainstream American culture around the world might

[24] Record Group 75, M234, roll 747, National Archives.

have wavered in its imposition upon Indian tribes through the period in question is not only illogical, but is also inconsistent with records pertaining to the reactions of agency personnel toward tribal governance while the Dawes Act was in effect. In documents preserved for Sioux Country at least, there exists in correspondence of War and Interior Department officials up and down the chain of command unmistakeable agreement in the belief that the manipulation of tribal government was essential to the control of the tribes, and the dissolution of tribal authority was a key to the detachment of individual Indians from tribal ties for entry into mainstream society as citizens. Methodically over the years, they dismantled traditional governments by fairly uniform procedures. Characteristically, federal officials replaced government by traditional chiefs and headmen as recognized forces on reservations with "made-chiefs" and advisory committees comprising other compliant Indians, and these in turn with elected assemblies, or general councils, which delegated authority to Business Committees chaired by agency Superintendents. The Committees voted on such things as land management, claims development, tribal fund allocations, and tribal memberships. They were summoned infrequently at the pleasure of Superintendents, sometimes remained inactive for years, and in most though not all instances were defunct by the early 1920s. Traditionalists protested in vain against the erosion of independent tribal authority through petitions and delegations to Washington, DC. For Sioux Country it is fanciful to suggest that any viable, federally recognized tribal government of the people's unencumbered choice existed on a reservation by 1910.[25] Where Indians participated in decisions about the general affairs and resources of their tribes at all, it was through Business

[25] An example of the long term process of dismantlement is contained in Herbert T. Hoover, "The Yankton Sioux Experience . . . 1900-1930," *The American West* (Toledo: the University of Toledo, 1980), 53-72.

Committees headed and controlled by agency Superintendents.

In spite of this, during recent proceedings lawyers argued, and evidently justices were swayed to believe, that effective tribal government existed with congressional sanction on a Sioux reservation through the Progressive Era, following the full implementation of the Peace Policy.[26] Their assumption must have evolved from scanty research, because Indian Field Service records, correspondence of Interior Department officials, Inspectors' Reports and congressional documents all indicate otherwise. Some federal officials may have been crooked and despicable, but few of them were fools enough to leave tribal governments intact. They picked them apart and transferred their functions mainly to regular agency employees. From the Agency, authority was delegated to employees at Sub-agencies or Farm Districts who dwelled in the communities. At the grass roots, Sub-agents and Farmers (one and the same in many instances) marshalled the forces around them effectively to remain in control.[27]

Included in local teams were tribal members, mainly those of mixed-heritage with tractable dispositions. They served as Assistant, Additional or District Farmers; tribal Policemen; judges in Courts of Indian Offenses; and various wage labor employees. All Indian appointees were treated as liasons or instruments of social control. Their prerogatives were restricted and controlled by Farmers, Superintendents and other agency personnel. Tribal judges, for example, worked under federal policy like Justices of the Peace at the low end of an appellate judicial system wherein U.S. Farmers or Superintendents reviewed their cases with authority to reverse their decisions.

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[26] *Solem v. Bartlett.*

[27] The central roles of U.S. Farmers in reservation district management is evident in the article "Arikara, Sioux, and Government Farmers: Three American Indian Agricultural Legacies," *South Dakota History*, XIII (spring/Summer 1983), 22-48.

The contention that Indian officers recognized or employed by agencies gave expression to tribal sovereignty with congressional recognition cannot be defended through the examination of records pertaining to the local applications of federal Indian policy. Under federal sanction, Indian leaders exercised little authority in the lives of tribal members, and almost none over the lives of White people who settled on surplus lands pursuant to Sections 5 and 6 of the Dawes Act. (See Appendix C)

Rigorous effort by agency officials to dismantle and control if not destroy tribal governments should not have been allowed, according to recent popular opinion, but it went on with tacit approval by congressmen through allocations of funds without significant protest. What happened almost a century ago can only be superseded, either by congressional action or by an amendment to the Constitution of the United States. As the Acting Atorney-General put it in 1905: "it is for Congress, and not for the courts, to" legislate federal policy for affairs on Indian reservations.

If the urgency of need for some solution to current confusion regarding federal and tribal jurisdiction within the original boundaries of reservations is not clear enough in examples of conflict presented at the beginning of this paper, it is dramatically apparent in the review of briefs and decisions on jurisdictional boundary cases that have come before the federal courts since the early 1960s.[28] A colleague from the discipline of law on the faculty of the University of South Dakota underscores the need, and calls for the help of historians, in her review of five significant cases, which follows.

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[28] The initial overview of the General Allotment Act in Appendix B is helpful. Additional work must be accomplished in primary sources for each application of Section 5, however, in order to provide an adequate synthesis of information pertaining to its specific use.

APPENDIX A: The Issue of Constitutional Guarantees

United States Senate Bill 2564, introduced by Barry Goldwater during the Second Session of the Ninety-ninth Congress on June 16, 1986, precipitated discussion regarding the consequences of granting tribal governments jurisdiction over Whites, or over Indians without tribal membership. The bill provided the administration of justice by the Salt River Pima-Maricopa Indian Community Court over criminal misdemeanor offenses. It went to the Committee on Indian Affairs with support from officials in Arizona state government and nearby cities, and with assurance that this Indian court was up to the task.[1]

Deputy Assistant U.S. Attorney General Victoria Toensing wrote the opinion that while under current law established in *Oliphant v. Suquamish Tribe* (1978) an Indian court had no jurisdiction over non-Indians, the Department of Justice supported the change in light of endorsements from non-Indian officials in Arizona. She raised questions, nevertheless, about the capacity of the Court to handle the caseload; the community to provide jail space; and the tribal government to assert jurisdiction without infringing on the constitutional rights of non-members: right to appointed counsel, trial by jury, proper administration of the test for intoxicated driving, application of proper rules of evidence, and right of appeal.[2]

Concern about the constitutional rights of persons tried by the tribal court gained more succinct expression from South Dakota Attorney General Mark V. Meierhenry. In a letter to Senator James Abdnor on September 4, he expressed firm opposition to S. 2564 because "Congress cannot constitutionally deprive an American citizen of his Bill of Rights guarantees" by placing him under a politi-

[1] 99 Cong., 2 Sess., S. 2564; Letters of support attached to the bill when it went to Committee.

[2] Statement of Victoria Toensing . . . before the Select Committee on Indian Affairs, United States Senate, July 23, 1986.

cal force not bound by constitutional constraints. At risk were the republican form of government guaranteed to each state group, right to appoint counsel, right to a jury of persons "from which members of a defendant's race are not automatically excluded," and right to trial by a political system in which one may participate. Any bill extending jurisdiction to a tribe over non-Indians, Meierheny contended, would have to contain safeguards to assure these rights.[3]

[3] South Dakota Attorney General Mark V. Meierhenry to James Abdnor, September 4, 1986.

APPENDIX B: The Purposes of the Dawes (General Allotment) Act of 1887

While congressmen debated the bill that became the Indian Reorganization Act of 1934 (which reversed the philosophy behind the Dawes Act), the Office of Indian Affairs employed D. S. Otis to write a history of the act of 1887. He explained how it transformed earlier piecemeal efforts to place Indians on individual farms and ranches into a general plan for severalty in most of the tribes, discussed arguments that led to its passing, identified groups that had been for and against it, and described its early application.[1] When Francis Paul Prucha prepared Otis' report for reprint in book form, he wrote in the introduction that "to many reformers" who shared responsibility for the passing of the bill authored by Henry Dawes "this was the most important means of destroying tribalism," and that Otis had demonstrated "how the allotment policy fitted well into the dominant views of that age of individualism." [2]

Throughout his text, Otis quoted and paraphrased opinions to demonstrate that most reformers and legislators supported the act to prevent the further loss of Indian land, but "the supreme aim of the friends of the Indian was to substitute white civilization for . . . tribal culture. . . . Allotment was counted on to break up tribal life." [3] Other philosophies were influential. Mention that "Indians were of course making no use of natural resources which should be developed in the interests of civilization" expressed the legacy of Vattel.[4] But belief that "allotment was the legal method by means of which

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[1] *The Dawes Act and the Allotment of Indian Lands* (Francis Paul Prucha, editor; Norman: University of Oklahoma Press, 1973).

[2] *Ibid.*, x-xi.

[3] *Ibid.*, 8-9.

[4] *Ibid.*, 17.

. . . breaking down the reservations . . . was to be accomplished" expressed the social and economic purposes of most non-Indians.[5] In a summary remark, Otis expressed the opinion that "allotment was first of all a method of destroying the reservation and . . . secondly a method of bringing security and civilization to the Indians." [6] And he demonstrated in many ways that this was the popular solution to the "Indian problem" among most philanthropic reformers, legislators and members of the voting public.

The major fault in Otis' analysis was excessive reliance on published agency reports and congressional documents, and failure to use original sources generated the grass roots. Correspondence and inspection reports express far greater opposition to allotment and surplus land sales by Indians than he perceived. But primary sources corroborate the perception that both the popular goal of Whites and the accepted policy of congressmen and federal administrators was to de-tribalize Indians, and destroy their reservations.

This conclusion came from a substantial number of congressional publications, many of which contain succinct statements by members of Congress. Congressman Thomas Skinner of North Carolina made a typical argument in 1886 when he said that "tribal relations must be broken up"; Indians should "shake off the shackles of tribal authority." With more land on reservations than they could "profitably use," they should sell surplus so Whites "may get possession of them and come in contact with Indians." Through the possession of individual allotments and exposure to subsistence farmers would come "the most direct route to citizenship for the Indian." [7]

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[5] *Ibid.*, 21.

[6] *Ibid.*, 32.

[7] 49 Cong., 2 Sess., *Congressional Record* (December 15, 1886), 190.

"No better element can be found than the men who go out and settle upon the public lands, and make for themselves honest homes," said Senator Henry Teller from Colorado. "Give to our people . . . the right to go upon the Indian lands and make, side by side of the Indian farm, a farm tilled by the aggressive and enterprising Anglo-Saxon, and in a little while contact alone will compel these people to accept the civilization that surrounds them on every side." [8]

There was dissent all along. Back in 1880, a minority in the House Committee on Indian Affairs expressed the opinion that "it does not make a farmer out of an Indian to give him a quarter section of land," and went on to charge that "the main purpose of this bill is not to help the Indian . . . so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement." [9] In 1883, stronger opposition came from spokesmen for the Creeks in a memorial containing evidence of numerous instances where allotment and citizenship had led to extreme hardship.[10]

Generally, views expresesd in congressional sources support Otis's conclusions, however. Most congressmen and reformers favored the Dawes Act to destroy tribalism, to instill desire in Indians for self-sufficiency through personal initiative, to expose allottees to the example of agrarian subsistence by opening surplus lands within reservation boundaries to bonafide settlers, and to remove obstacles to citizenship in the United States. One would have to torture phrases considerably to show from majority opinions any inclination to preserve reservations or tribal authority. One would search in vain to discover a hint that congressmen who drafted and voted the Dawes

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[8] 49 Cong., 1 Sess., *Congressional Record* (February 25, 1886), 1763.

[9] 46 Cong., 2 Sess., House Report No. 1576.

[10] 47 Cong., 2 Sess., House Miscellaneous Document No. 18.

bill into legislation felt anything but antagonism toward tribal governance. Surely they would have opposed the notion that Whites who settled within reservation borders to serve as models for allottees might be subjected to tribal governance. This is not to say tribal authority would necessarily have offended all non-Indians; by the late 1880s, many lived without inconvenience on reservations as husbands of tribal women. It is only to recognize that the vast majority of congressmen in that era believed that tribal governments and reservations were temporary expedients soon to vanish as Indians received land in severalty and citizenship. The suggestion that White settlers might be placed under tribal jurisdiction, one suspects, would to them have seemed preposterous.

APPENDIX C: The Erosion of Government in Tribes of the United States from the Age of Jackson to the 1920s

Infringement on the "ancient customs and laws of the much older tribal governments," to which Tim Tiago referred in his editorial, began when colonial merchants and administrators of New France selected middlemen for the fur trade. Historian Harold A. Innis wrote that "the best of hunters were rewarded with favors and promotions," and "governors made titular officers of those . . . accounted the best huntsmen and warriors." To each they gave "a coat, a pair of breeches and a hat, appointing him captain of a river."[1] To each, Innis might have added, they also extended advantage in the exercise of influence among tribal members around them for their central roles as liasons between suppliers of trade goods and Indian consumers. For diplomatic purposes, early Canadian fur trade operatives engaged in a practice known to officials of the United States in the nineteenth century as "chief-making."

Meriwether Lewis and William Clark, and Pierre Choteau Jr.'s leading Upper Missouri River trade operative, Honore Picotte, were among leading explores and merchants who engaged in this practice during early national history. In 1856, General William Harney founded Fort Randall near the center of Sioux Country, wrote about chief-making and its significance, and described his effort to alter the process for the enhancement of federal authority:

> Certain chiefs were recognized by the nation, others by the military, others again by the agents, and the traders, for their own purposes, have most unwarrantably given medals and appointed chiefs. . . . These conflicting interests necessarily weakened the authority of all these chiefs. . . .

[1] *The Fur Trade in Canada.* (New Haven: Yale University Press, 1930), 141.

> I have caused the Sioux nation to select and appoint a certain number of head chiefs and chiefs to govern them, and to see that they carry out the conditions to which they have assented in counsel; and I have informed them that these would be the only chiefs recognized by the President, myself, or their Indian agent.[2]

Harney designated leaders mainly to carry on diplomatic affairs, but his recognition gave them status within their tribes. Regardless of previous standing, they now were in position to influence Indian-White negotiations, the distribution of annuities, the choice of recipients for gratuities, the distribution of irregular agency employment, etc. Men who acquired positions in tribes by traditional means as well as those who did not were eligible for such "appointments." Only those who demonstrated steady support for federal policies retained recognition for long.

Chief-making became common practice among Field Service Agents as they founded reservations and searched for leaders to take over new bands formed by agency staff, and cooperative chiefs to replace traditional leaders as they passed away. On the Yankton Sioux Reservation, for example, Agent Alexander Redfield recognized Francis Deloria as "chief" of a new mixed-blood band. Redfield's successors, acting with approval from their superiors in Washington, DC, "made" Jumping Thunder chief in place of Smutty Bear, Felix Brunot then Blue Cloud chief in place of Petty Boy, John Ree chief in place of Made Bull, etc.[3]

Within approximately a quarter century, Greenwood agents reported the majority of chiefs to be compliant, and gained their approval for the replacement of tradi-

[2] 34 Cong., 1 Sess., Ex. Doc. 130, Harney to Secretary of War, March 5, 1856.

[3] Herbert T. Hoover, "Yankton Sioux Experience in the Great Indian Depression, 1900-1930," *The American West* (Toledo: University of Toledo Press, 1980), 57-68.

tional by republican tribal government under federal supervision. J. F. Kinney declared that chiefs were "not only useless," but also were impediments to "progress" on the reservation. In 1891, all who remained in office were induced to join a representative "Speaking Council." Young men who aspired to leadership positions through traditional means formed the "Sons of the Chiefs" and "Society of Orphans" in protest, but thier letters were ignored. In 1901, when made-chiefs Jumping Thunder and Medicine Cow passed away, Superintendent James D. Staley said he would no longer "recognize chiefs" on his reserve. After that, Superintendents permitted the elective council to fall into disuse. Later on, tribal spokesman Clement Smith recalled the subsequent existence not of effective tribal government, but only of "factional groups . . . floundering." [4]

Similar developments occurred around other agencies. At Sisseton, the constitutional "Renville Republic" collapsed in the mid-1890s, following the death of its only President, Gabriel Renville, leaving the tribe without effective central government until the New Deal Era. In most other Sioux tribes, the destruction of tribal authority was not as complete, but the process of erosion was similar.

Among Tetons, it began as early as 1878, when a commission recommended the distribution of rations to Upper Brule and Oglala family heads instead of to band leaders, and wrote that "the domination of the chiefs should be broken up" and replaced with authority by tribal officers elected for short terms. The chiefs exercised power with support from traditionalists, who were opposed to progress according to federal standards, and their removal had become "an agricultural necessity." [5] In 1880, Crow Creek Agent William Dougherty said

[4] *Ibid.*, 58-64.

[5] Report by Col. D. S. S. Stanley and Rev. A. L. Riggs, August 28, 1878, M234, roll 266, NA.

tribal government should be destroyed in order to undermine "traditions and prejudices . . . of which the head chief is the head repository." [6] In 1882, he recommended "breaking up the organizations of bands and tribes, and establishing the family as the basis of social organization," for it would then be possible to "impart to them some semblance of the manners, customs and laws of our civilization." As long as Indians lived on communal land "under the patriarchal system, they must continue to be trubulent, idle and expensive to maintain." [7]

In 1889, as General George Crook explained the terms of the Great Sioux Agreement, he warned Teton leaders that the survival of tribal government should no longer be assumed; "it does not necessarily follow that because you are chiefs today, that you are going to remain so in the future." Those who could not accept "this new departure" (confinement to reservation life) would "have to give way to those who can." Like drift wood, one who "keeps up with the current will be all right, and that which cannot is left on the banks." [8]

Many were "left on the banks" thereafter. At Rosebud, Agent George Wright threatened to jail recalcitrants, and said that those who were "at one time recognized as chiefs, representing the older men, who have outlived their usefulness," were going to be thrust aside.[9] This happened at Standing Rock, where the Agent authorized

[6] Captain William Doughterty to Indian Commissioner, September 22, 1880, Crow Creek Files, Federal Archive and Records Center-Kansas City.

[7] Captain William Doughterty, "The Sioux," December 10, 1882, Letters Received by the Office of Indian Affairs, NA.

[8] Proceedings of Council at Standing Rock Reservation on the Agreement of 1889, July 26, 1889, Irregular Shaped Papers #440, NA.

[9] Agent J. George Wright to Indian Commissioner, June 16, 1890, Letters Sent, Rosebud Agency, FA&RC-KC.

Phillip Bullhead to take over the band of Little Dog, and directed mixed-blood District Farmer Joseph Archambault to bring into it not only Little Dog's people, but also those in the bands of See-the-Bear and Moccasin, making thirty-nine families in all.[10]

Almost without exception, agents supplanted traditional leaders with tribal governments amendable to federal plans. For their efforts, they received support and publicity from ecclesiastical spokesmen, who shared their philosophy. In 1909, one of them wrote that "tribal organization in itself always opposed civilization . . . for civilization means its downfall. . . . Where any form of this organization exists . . . , there you have a chilling shadow in the way of . . . progress." [11]

Military leaders, agency personnel and missionaries all thrived on congressional support as they endeavored to manipulate, control, and in some instances destroy tribal government. The results of their efforts in Sioux Country varied from reservation to reservation. On those situated east of the Missouri River, tribal authority was either reduced to "factional groups . . . floundering," or for all practical purposes destroyed. On reservations west of the Missouri, where larger Indian populations were shielded from White influences by distance and the possession of terrain with marginal value for agriculture, tribal leaders were more successful in their defense of their prerogatives. Even there, the procedures of attack on tribal government were the same. Only the timetable was different.

Most populous and remote of all Sioux reservations was that of Oglalas around Pine Ridge. Truculent Valen-

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[10] U.S. Agent, Standing Rock, to Joseph Archambault, July 31, 1901, Standing Rock Files, FA&RC-KC.

[11] Augustus Field Beard, *A Crusade of Brotherhood: A History of the American Missionary Association* (Boston: The Pilgrim Press, 1909), 83.

tine McGillycuddy initiated a methodical attack on the prerogatives of Red Cloud and other traditional leaders in the mid-1880s with the establishment of an "Agency Council" of 100 "working and progressive" delegates from the Farm Districts. They spoke for the tribe on matters of interest to the Agency and for some years doubled as the Court of Indian Offenses.[12] Soon, officials in Washington, DC, joined the attack on traditional leaders, withdrawing recognition from them and approving compliant made-chiefs (in one instance, replacing Red Cloud by American Horse).[13]

"Old and non-progressive Indians who call[ed] themselves 'head Men and Chiefs'" organized an "Oglala Council" of 300 or more to defend their prerogatives, to oppose federal policies, and to assert treaty rights. At first, they held monthly meetings. Later, they gathered only two or three times a year. Never did they receive recognition as members of a legitimate political body by Indian Office officials.[14] In 1907, the Acting Commissioner of Indian Affairs agreed to raise no objection when they assembled to discuss general "questions of interest." But the Indian Office recognized only the body organized by the Agency, which was by then the "Business Committee appointed by the general counsel" of voting tribal adults, to reach official decisions about all matters except those which justified the assembling of the general council.[15]

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[12] Agent V. T. McGillycuddy to Indian Commissioner Hiram Price, May 4, 1884, Letters Received, NA; Pine Ridge Annual Report, [ ], Letters Sent, FA&RC-KC.

[13] Secretary of the Interior to Acting Commissioner of Indian Affairs R. V. Belt, July 1, 1889, Letters Received, NA.

[14] Superintendent John R. Brennan to Indian Commissioner, June 24, 1909, Letters Received, NA.

[15] Acting Commissioner C. R. Larabee to Pine Agent, April 26, 1907, Letters Received, NA.

The Oglala Council asserted its influence, to be sure. For example, from 1902 to 1906 it foiled the efforts of Agent John Brennan and the Business Committee to arrange the lease of tribal pastures to a livestock syndicate. At length, Brennan dropped the issue for fear of provoking unnecessary friction in the tribe.[16]

This was an exception, however, because even on remote Pine Ridge "progressive" leaders spoke in ever increasing numbers favoring cooperation with the Agent. Several wrote as early as 1894, urging federal officials to "do away with this Chieftain business which is unprogressive" and to rely on "regular councils . . . as the white men have . . . to encourage and assist progressive Indians." [17] The number of men with this disposition grew as the tribe became increasingly dependent on federal support. In 1917, when compliant voting adults were in the majority and traditionalists of the Oglala Council were silent, Superintendent H. M. Tidwell called for the election of a new business committee of twenty delegates from farm districts, by ballot in general council, to function as an "executive committee" or "deliberative body of practical size to consider and act on the ordinary business of the tribe." [18] This committee carried on tribal affairs under supervision by the Superintendent until the 1930s, when the general council adopted and the people voted approval for a constitutional government to operate under the terms of the Indian Reorganization Act.[19]

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[16] John R. Brennan to Indian Commissioner, November 3, 1902, April 14, 1905, November 17, 1906; Oglala Council to John R. Brennan, November 11, 1906, Letters Received, NA.

[17] George Standing Bear, Henry Twist and Fast Forse to Indian Commissioner to D. H. Browning, October 13, 1894, Letters Received, NA.

[18] Pine Ridge "Constitution, By-laws, and Resolutions," Indian Central Classified File, IRA Records, NA.

[19] Acting Commissioner A. C. Monahan to Secretary of the Interior, November 30, 1935, Pine Ridge IRA Files, NA.

On Pine Ridge Reservation, traditional Oglala leaders stood more tenaciously against the erosion of their authority over central tribal affairs then did leaders anywhere in Sioux Country except perhaps those at Standing Rock, and obviously the Oglalas were unsuccessful in the effort to preserve their central power. On Pine Ridge, a similar process of erosion took place in the communities, where traditional bands and their leaders were replaced for official purposes by Farm Districts and officers "made" by the Superintendents. After the Agency Council doubled for a time as the Court of Indian Offenses, special judges were appointed to the Indian Court as regular agency employees at the salary of $7 a month. Mainly, they worked in cooperation with salaried tribal policemen toward social control under supervision by the U. S. Assistant or Additional Farmers in the Districts. Case loads were sparse, according to a 1915 report, but fairly significant. "Over previous years" the judges had tried forty-seven criminal cases "dealing with assault, adultry, forgery, cattle stealing, timber cutting, elopement, contempt of court, drunkenness, fighting, wife beating, seduction and perjury." [20] Without question, the judges and policemen performed vital services of governance. They did so not as officials of their tribe, however, but as regular agency employees on salaries under direct supervision from Farmers, who in turn functioned as sub-agents under Superintendents at Pine Ridge. And they behaved like agency employees, especially when dealing with traditional ceremonies regarded inconsistent with Indian Office orders, such as the practice of Peyote religion.[21]

At the community as well as the central level, on most reservations tribal members participated in governance through the era when the Dawes Act was in effect. But

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[20] Inspectors Fred S. Cook and H. S. Traylor, "Oglala Council" Report, received July 12, 1915, Indian Central Classified File, NA.

[21] Pine Ridge Inspection Report, July 7, 1915, Indian Central Classified File, NA.

they did so as agency operatives more than tribal leaders under close supervision, and the power they exercised diminished considerably. In primary sources pertaining to their activities, there is nonetheless evidence that they functioned to control some patterns of behavior among Indians who occupied Indian land. Nowhere in these records does evidence appear to state or demonstrate their power of jurisdiction over non-Indians within reservation boundaries, however, on land ceded as surplus for occupancy by bondifide settlers.

Inasmuch as congressmen had access to correspondence and reports on reservation life, and allocated funds to support it, one must assume that governance which existed approximated governance which congressmen meant to support. One's inclination regarding what congresional intent should have been does not alter the contents of a great body of original documents. They lead to the conclusion that congressmen as well as administrators meant to diminish, constrain and in places destroy tribal governance as part of the plan for de-tribalization, and intended not to authorize tribal authority over Whites who occupied ceded land, or citizen Indian allottees who held patents in fee, within the original boundaries of trans-Mississippi western reservations.

CONGRESSIONAL INTENT REGARDING JURISDICTION ON CEDED LAND DURING THE ALLOTMENT ERA

PART II: THE LAW

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INTRODUCTION

In most areas of Anglo-American jurisprudence, a coherent body of law develops when a series of appellate cases are decided in such a way that one decision lends precedent to the next decision. Each new case places the court at a fork in the judicial road. In most cases, courts will follow the familiar path of past legal precedents. Occasionally, however, courts detour from established precedents. If two cases cannot be reconciled, they are distinguished, and the law thereafter develops along two separate paths. Other times, a well-worn road is abandoned, as precedents which no longer reflect current legal, social or political values are overruled. A landmark decision often results when a past precedent is overruled, and a new legal trail is blazed.

Indian law, however, often defies precedent. Old roads as well as new roads may be abandoned without adequate legal or policy justifications. New trails are often not clearly marked. Decisions which could have been landmarks [1] are seemingly disregarded by subsequent courts. For lawyers litigating Indian law issues, it is almost impossible to "map" current developments in Indian law. The body of Indian law lacks coherence and consistency.[2] Indian law seems to be developing on a case-by-case

[1] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) is a case in point.

[2] "Indian law . . . is a bottomless pit." NATURAL RESOURCE SECTION, OFFICE OF ATTORNEY GENERAL, A REVIEW OF THE SOUTH DAKOTA LAND CLAIMS xii (1983). Three Assistant Attorneys General co-authored the report; John P. Guhin, Harold H. Deering, Jr., and Mark Smith. Confusion has also been noted by commentators, (*See* Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 AM. IND. L. REV. 57 (1984)) and litigants, Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Utah v. Ute Indian Tribe, *petition for cert. filed* 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821) [Hereinafter, Petition for Writ of Cert., Utah v. Ute Indian Tribe].

basis, without adhering to precedent and without establishing landmark decisions from which a coherent body of law might begin to develop.

These disturbing developments in Indian law jurisprudence are especially apparent in the disestablishment cases,[3] sometimes referred to as boundary cases or diminishment cases. Such cases typically arise out of disputes between Indian tribes or tribal members and state or local governments. At issue is the respective authority of tribes and other governmental units to exercise jurisdiction over land areas once set aside as Indian lands and later opened for settlement pursuant to § 5 General Allotment Act [4] surplus lands acts. "Enacted over a span of almost thirty years after the passage of the Dawes Act of 1887 [General Allotment Act, 24 Stat. 390 (1887)], these statutes provided for the allotment in severalty of tracts of land on specific reservations to individual tribal members, and then for the opening of the surplus lands to settlement." [5] The fundamental issue in each of the disestablishment cases is: Did Congress intend the surplus lands acts to diminish reservation boundaries?

Recent disestablishment decisions by the United States Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States District Court

[3] There are five major Supreme Court disestablishment decisions: Seymour v. Superintendent, 368 U.S. 351 (1962); Mattz v. Arnett, 412 U.S. 481 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 581 (1977); and Solem v. Bartlett, 465 U.S. 463 (1984). A pending case may also become a major case: Utah v. Ute Indian Tribe, 521 F. Supp. 1072, *aff'd in part and rev'd in part*, 716 F.2d 1298 (201) (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc*, 773 F.2d 1087 (5-2) (10th Cir. 1985), *petition for cert. filed*, 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821).

[4] General Allotment Act, 24 Stat. 390 (1887), § 5.

[5] Campbell, *supra* note 2, at 57.

for the District of North Dakota [6] have "compounded the confusion produced by the contradictions and conflicts already existing among the previous decisions in this area." [7] Important historical facts relating to legislative intent and federal policies regarding Indian people, Indian tribes and Indian lands, have been misapplied, misinterpreted, or ignored. Such cases violate available legal precedents while ignoring historical facts which are essential to a well-reasoned resolution of issues relating to Congressional intent. In some cases, "bad law" results because attorneys have failed to provide the courts with an adequate evidentiary record (e.g., testimony of qualified historians, historic documents, and legislative histories) from which a court could make factual findings to support legal conclusions regarding intent. In such cases, there is simply no historical evidence, and courts are left to function in an historical vacuum.[8] In other cases the historical record presented has been somewhat one-sided and incomplete. Historical reports which would be unacceptable by historian's standards have been given great weight by these courts. In still other cases, where limited historical evidence has been presented, courts have ignored or improperly interpreted such evidence, rendering decisions which might fairly be characterized as knowing attempts to rewrite history to reflect contemporary notions of social justice or political expedience rather than the intent of legislative drafters.

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[6] See cases cited *supra* notes 2 and 3, and United States v. Grey Bear, 636 F. Supp. 1551 (D.N.D. 1986).

[7] Motion of the Counties of Dewey, Ziebach, and Corson, South Dakota and the County of Sioux, North Dakota, for Leave to File Petition for Rehearing and Petition for Rehearing, at 2-3, Solem v. Bartlett, 465 U.S. 463 (1984). Also, see generally, Campbell, *supra* note 2.

[8] Seymour v. Superintendent, *supra* note 3; Mattz v. Arnett, *supra* note 3.

The current state of the law raises several perplexing questions: Why have the courts seemingly strayed so far off any definable course in the disestablishment cases? Why has no clear standard of construction emerged which might bring some order to the currently chaotic disestablishment adjudications? Will the United States Supreme Court seize an opportunity to clarify current confusion with a truly definitive statement?

In searching for possible answers to these questions, let us begin by retracing the steps of the United States Supreme Court in the five leading disestablishment cases decided to date: *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 581 (1977); and *Solem v. Bartlett,* 465 U.S. 463 (1984). Tracing the evolution of standards for determining Congressional intent in the disestablishment cases, perhaps a "missed turn" will be discovered, or a new path uncovered. After looking to past cases for guidance, one can look ahead to the critical juncture in the development of disestablishment case law which is looming on a not too distant horizon. The pending case of *Utah v. Ute Indian Tribe,*[9] currently on writ of certiorari to the United States Court of Appeals for the Tenth Circuit, will be analyzed as a potential landmark decision. The United States Supreme Court has the opportunity, in *Ute,* to clearly articulate a standard of statutory construction which encourages historical inquiry in the adjudication of Congressional intent issues. If such a standard is defined and followed, historians will play an essential role in assisting courts to understand and interpret historical facts relevant to the determination of issues of legislative intent. With adequate development and application of historical facts in disestablishment cases, perhaps legal conclusions based on

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[9] See *supra,* note 3.

those historical facts will begin to evolve into a series of consistent, coherent precedents.

STANDARDS FOR DETERMINING CONGRESSIONAL INTENT IN THE FIVE MAJOR DISESTABLISHMENT CASES

The Broad Context: Statutory Interpretation in the Supreme Court

"The legitimate scope of a court's authority to make law where a legislature has spoken . . . is a recurring issue in American legal thought." [10] The Supreme Court has wrestled with two competing versions of the "proper" judicial role in statutory construction cases. "One version grants primacy to the legislature as the author of the statute and therefore emphasizes the statutory text or legislative intention. . . . The second version grants primacy to the judicial reader or interpreter of the statute and therefore emphasizes the creative role of common law courts." [11] Each version has enjoyed dominance during at least one regime of academic thought. These regimes which influenced judicial behavior were catalogued by Professor Paul N. Cox of Valparaiso University as follows:

> The first regime, which shared some of its values with legal positivism, prevailed in the late 19th and early 20th centuries. Under it, courts . . . were to emphasize the plain meaning of statutory text. . . . [T]ext had primacy under such a view.
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> The second regime, which may be identified with legal realism, . . . denied the authority of text by demonstrating the indeterminacy of the meaning of

[10] Cox, *Rumination on Statutory Interpretation in the Burger Court*, 19 VALPARAISO UNIV. L. REV. 287, 288 (1985).

[11] *Id.* at 289.

> language and denied the authority of legislative intent by pronouncing it a fiction. Judges on these premises are largely free from legislative will.
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> . . .
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> The third regime, perhaps best represented by the Legal Process School . . . recognized the freedom of judges to choose between alternative interpretations of a statute. . . . The language of statutory text, while not controlling, limited possible choices. . . . [T]he third regime substituted legislative purpose as the fundamental basis. . . . [T]he third regime . . . treat[s] author and interpreter as rough equals.
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> [W]e may have entered an era of the fourth regime, the regime of chaos. . . .
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> . . .
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> If there is therefore no currently dominant interpretive regime . . . it has nevertheless been recently claimed that a particular interpretive strategy has come to prevail in . . . the Burger Court: the strategy of literalism. If so, the Court has returned full circle to a version of the first regime and to the contradictions of that regime: the text has primacy, but its force is to be strictly limited to the language employed by the national legislature.[12]

Because Indian law develops within a larger body of law, problems of statutory interpretation which currently plague Indian lawyers may also be plaguing our colleagues in other legal specialties. Attempts to change the Court's approach to statutory construction issues in the Indian law context may be more difficult where the Court as a whole is operating in another regime.

[12] *Id.* at 290-295.

The Narrower Focus: Congressional Intent Determinations in Five Major Disestablishment Cases

During the past quarter century, the United States Supreme Court has on five occasions addressed questions of disestablishment or diminishment of Indian reservations.[13] In each case, the Court interpreted acts of Congress which opened surplus lands (lands remaining after allotments to individual Indian tribal members) to non-Indian settlement, to determine whether those surplus lands acts were intended to change or diminish reservation boundaries. None of the cases has yet emerged as a controlling precedent. None of the cases has as yet been overruled by a subsequent disestablishment case. In each case, the Court has at least given lip service to the need to determine Congressional intent, but rules of construction have shown little consistency in application. The court has heretofore failed to adopt a general historical perspective when interpreting surplus lands acts. Instead, the court seems to be proceeding on a case-by-case, reservation-by-reservation basis when adjudicating disestablishment issues. Confusion abounds, as commentators both favoring and opposing disestablishment results freely admit.[14] During the October 1986 Term, the United States Supreme Court will again have an opportunity to clarify the confusion in yet another disestablishment case, *Ute v. Utah Indian Tribe,* 521 Supp. 1072, *aff'd in part and rev'd in part,* 716 F.2d 1298 (2-1 decision) (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc,* 773 F.2d 1087 (5-2 decision) (10th Cir. 1985), *petition for cert. filed,* 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821).

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[13] See *supra* note 3.

[14] See *supra* note 2. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 223 nn.56 and 57 (1982 ed.).

Seymour v. Superintendent

In *Seymour* a member of the Colville Indian Tribe was convicted of burglary in a Washington state court. In a habeas corpus proceeding, Seymour alleged that the state court which had convicted and sentenced him was without jurisdiction, since the crime he had allegedly committed took place in the southern half of the Colville Indian Reservation, within "Indian country."[15] The Washington Supreme Court denied the petition, holding that the southern half of the Colville Indian Reservation had been disestablished and was therefore no longer "Indian country." On writ of certiorari, the United States Supreme Court reversed. It found that the surplus lands act of 1906 did not diminish the original boundaries of the reservation.[16] The case was decided in an historical vacuum. No reference was even made to the General Allotment Act or to the legislative history of the surplus lands act in question, and no one addressed the fact that the 1906 act was based on a formal cession agreement. S. Rep. No. 1424, 59th Cong., 1st Sess. (1906). In construing the statute, without aid of historical facts, the court relied primarily on the language of the act and a comparative statutory analysis (comparing one act with an earlier act or resolution).

Mattz v. Arnett

In *Mattz v Arnett,* 412 U.S. 481 (1973), the California Director of the Department of Fish and Game

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[15] 18 U.S.C. § 1151 defines Indian country to include a) all lands within the limits of any Indian reservation; b) dependent Indian communities; and c) allotments.

[16] Act of March 22, 1906, 34 Stat. 80. Perhaps *Seymour* is most remembered for its dicta, in which the Court distinguished Act of 1892, 27 Stat. 62, 63, the express terms of which "vacated and restored to the public domain" the northern, disestablished half of the Colville Indian Reservation. The Court thus implied that Congress had intended some tracts of former reservation lands should be subject to state law. 368 U.S. at 354-55.

brought an action against a member of the tribe to forfeit confiscated gill nets used in fishing. The defendant alleged he could not be denied his fishing rights within Indian country, and his use of the gill nets had occurred within the boundaries of the Klamath River Indian Reservation. The outcome of the case hinged on the interpretation of a surplus lands act, Act of June 17, 1892, 27 Stat. 52. The United States Supreme Court held that the Act of 1892, while containing allotment provisions, was not intended to terminate the reservation. The Court accepted a standard whereby Congressional intent to terminate reservations must be expressed on the face of the act *or* must be clear from surrounding circumstances and legislative history. In a marked departure from the method of statutory construction employed in *Seymour*, the Court considered evidence relating to the history of the Klamath Reservation, the legislative history of the 1892 Act, the legislative history of bills which were defeated which would have expressly abolished the reservation, and evidence of subsequent treatment of the land as reservation land by the Department of the Interior. *Mattz* thus marked a tentative beginning of the development of a historical interpretation of surplus lands acts. Although the Court had a historical perspective of sorts, that perspective was distorted slightly by reliance on certain unfounded and conclusory statements of historical "fact." For example, the Court accepted at face value an unsubstantiated statement from the Solicitor General that the policy of the Dawes Act was to continue reservations.[17]

Despite a greater reliance on historical data, the distinction between § 5 of the General Allotment Act and other historical legislative enactments was blurred. No specific

[17] The Solicitor General has consistently argued against disestablishment in each of the reservation disestablishment cases. In order to remain consistent in advocated outcomes, however, the Solicitor General has been forced to shift legal theories in an attempt to meet courts' objections to previously rejected positions.

reference to § 5 was included in the court's opinion. The plain meaning of the statutes was still given greatest weight in the ultimate decision. In this regard, the Court expanded the category of language that could terminate reservations to include, in addition to the previously approved "vacated and restored to the public domain," "discontinued." Express references to abolished reservation lines was also deemed evidence of disestablishment.

DeCoteau v. District County Court

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court determined that the Lake Traverse Indian Reservation in northeastern South Dakota had been disestablished by the surplus lands act, Act of March 3, 1891, 26 Stat. 989. In making its determination the Court had before it a complete legislative history of the General Allotment Act as well as the legislative history of the surplus lands act in question. The legislative history of the surplus lands act was read in context with post-Dawes Act developments. Nevertheless, the Court again placed great weight on the language of the 1891 Act, indicating that the plain language of the act indicated the tribe's *consent* to "cede, sell, relinquish and convey" its reservation lands.

In the context of § 5 of the General Allotment Act, the *DeCoteau* court had an opportunity to limit *Seymour* and *Mattz* to their facts. It declined to do so. Instead, it made a weak attempt to distinguish the two prior cases, while clearly indicating that *Seymour* and *Mattz* were still "good law." Justices Douglas, Brennan and Marshall, dissenting in *DeCoteau*, saw an inconsistency between the Court's majority opinion in *DeCoteau* and its earlier decisions in *Seymour* and *Mattz*. A focus on principle, rather than semantics, lends support to the dissenters' observation in that regard. However, read as a whole, the dissenting opinion is the antithesis of a general historical context standard for interpreting surplus land acts.

Rosebud Sioux Tribe v. Kneip

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Supreme Court found that the original boundaries of the Rosebud Sioux Reservation located in south-central South Dakota, had been diminished by three surplus lands statutes, enacted in 1904, 1907 and 1910. The Court had the benefit of an extensive historical record. It examined the historical circumstances of all three statutes in great detail, as well as documents reflecting the Indian policy during the period in question, particularly § 5 of the General Allotment Act. Evidence of subsequent developments was also considered. Such evidence established actual assumption of state jurisdiction, unchallenged by Congress or the Department of Indian Affairs.

The Court announced and applied a workable three-part standard for determining Congressional intent. A court was to examine 1) the fact of the legislative act; 2) surrounding circumstances; and 3) legislative history.[18] Ascertainment of Congressional intent was clearly the determinative factor in the Court's decision. The legislative history reflected a clear intent to end reservation status. The Court was also influenced by the plain meaning of statutory terms relating to cession and relinquish-

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[18] 430 U.S. at 587. Although there was no evidence of consent by the Rosebud Sioux Tribe to relinquish its lands (consent had been a factor in *DeCoteau*, the absence of consent was not deemed controlling, since the acts construed in *Rosebud* were passed after the Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). "After *Lone Wolf* in 1903 established that Congress could act unilaterally toward Indian lands and reservations, the only relevant inquiry became Congressional intent." The Court also seemed unconcerned about the absence of judicially-approved phrases such as "restored to the public domain" and "discontinued." The absence of such magic words did, however, concern the three dissenters, Marshall, Brennan and Stewart. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 618 (Marshall, J., dissenting).

ment, similar to the language in the *De Coteau* surplu lands acts.[19]

Rosebud had all the indica of a potential landmark case. The Court's mode of decisionmaking in *Rosebud* could have been a prototype for subsequent litigation of disestablishment issues. The Court seemed to be clearly focusing its inquiry into the effect of surplus lands acts on Congressional intent, and that intent was construed against the backdrop of the General Allotment Act. It went on to indicate that the surplus lands acts should be read in their historical context, as the Court had done in *DeCoteau*, so that Congressional intent might be more accurately discerned. Yet *Rosebud* has not been subsequently applied as a landmark precedent.[20] Perhaps, if the Court at this point had clearly distinguished *Seymour* and *Mattz*, or limited those cases to their facts, the future conflicts encountered in trying to reconcile those vestigial cases with later pronouncements could have been avoided,[21] and a coherent body of disestablishment case law could have sprung from the *Rosebud* decision.

Recent judicial history, however, indicates that *Rosebud* has not been treated as a definitive landmark decision. Instead, it has been relegated to a status of just one of the four preceding disestablishment cases which the court in *Solem* could not reconcile. Several observers, particularly those litigating on behalf of non-Indian clients and governmental units in current disestablishment controversies, are left to wonder why the Court, which appeared to be chartering a clear course in *Rosebud*, either veered from the course, or "missed the turn" in deciding *Solem*.[22]

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[19] 430 U.S. at 597.

[20] Ute Indian Tribe v. State of Utah, 773 F.2d 1087, 1103 (1985) (Seth, J., dissenting).

[21] The dissenters noted a further inconsistency not only with *Seymour* and *Mattz*, but also with the Court's more recent decision in *DeCoteau*. 430 U.S. at 618 (Marshall, J., dissenting).

[22] Motion of the Counties, *supra* note 7, at 7.

Solem v. Bartlett

In *Solem v. Bartlett*, 465 U.S. 463 (1984), a convicted rapist filed a habeas corpus petition. He contended that the situs of the crime (a portion of the Cheyenne River Sioux Reservation opened for settlement by a surplus lands act), was within Indian country, and hence the state court which convicted him was without jurisdiction. The United States District Court for the District of South Dakota issued the writ of habeas corpus, and the U.S. Court of Appeals for the Eighth Circuit affirmed. The Supreme Court, in an opinion authored by Justice Marshall, held that the Cheyenne River Act [Act of May 29, 1908, 35 Stat. 460] which authorized the Secretary of Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading, did not diminish the boundaries of the reservation.

The *Solem* court had access to historical data which led to its conclusion that "the Congress that passed the surplus lands acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process." [23] Nevertheless, the Court, in a quantum leap of logic, concluded that Congress enacted certain surplus land acts which contravened both its general intent and the official policies of the allotment era. For the same players to have enacted statutes with conflicting intent would seem incongruous. Yet in *DeCoteau* and in *Rosebud* (decisions *not* overruled or distinguished in *Solem*), the historical context had been deemed indicative of an intent to diminish and disestablish reservations through passage of the various surplus lands acts.[24]

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[23] 104 S. Ct. at 1165.

[24] *Id.* The position which the court adopted in *Solem* incorporated several arguments which had been advanced by the Solicitor General's office, but rejected in *DeCoteau* and *Rosebud*.

The Court departed from the standards set forth in both *DeCoteau* and *Rosebud*, standards requiring that historical evidence be considered in a broad historical context whein resolving issues of Congressional intent. In contravention of the *Rosebud* standard, the *Solem* court engaged in a very narrow and limited historical inquiry. Rather than relying on historical context to aid in the interpretation of the surplus lands acts, the Court reverted to a variant of "plain meaning" analysis, and concluded, "The most probative evidence of congressional intent is the statutory language used to open the Indian lands." [25]

Ironically, phrases similar to those which had been deemed determinative in the early disestablishment cases were considered by the *Solem* court to be merely "isolated phrases" and "hardly dispositive." [26] Thus, references to the "public domain," once thought to be charged with special significance, were relegated to a class of unoperative terms. In addition, express reference to "reservations thus diminished" were deemed somehow less than "explicit expression(s) of congressional intent to diminish" the Cheyenne River Sioux Reservation.[27] The proper historical perspective of the General Allotment Act, particularly § 5, played absolutely no part in the decision.

In analyzing the circumstances surrounding the passage of the particular surplus land act in question, the Court relied heavily on a historian's manuscript.[28] No attempt was made to read the legislative history of the particular act in question within the historical context of the allot-

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[25] *Id.* at 1166.

[26] *Id.* at 1169.

[27] *Id.*

[28] Hoxie, Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908 (undated manuscript).

ment era, or in concert with other contemporaneous surplus lands acts. In fact, the Court focused more attention on events noted by the historian expert witness which occurred *after* passage of the act, and demographic data compiled decades after its passage, than on historical evidence of legislative intent at the time the 1908 act was passed.[29]

The *Solem* court effectively substituted its analysis of the subsequent events for the *Rosebud* court's required analysis of legislative history and other historical facts, as it purported to resolve issues of congressional intent. The practical effect of such analysis allows courts to substitute their interpretation of modern policy as it should be, for actual, historical legislative intent:

> If courts engage in artificially narrow inquiries into statutory purpose, disregard principles announced in prior decisions, and allow their determinations to be governed by the vagaries of subsequent developments, then they are free to substitute their judgment for that of Congress, indulging in judicial revisionism by conforming statutes to presently accepted values and policy notions. To do so would be to remake history in derogation of the express mandate of *Rosebud* and *DeCoteau*.[30]

In the aftermath of *Solem*, disestablishment cases seem destined to be decided *ad hoc*, on a case-by-case basis,

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[29] 104 S. Ct. at 1167-1170. The approach taken by the court signals a significant departure from its conclusion in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978), that legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in the light of the common notions of the day and the assumptions of those who drafted them."

[30] 430 U.S. at 615; Motion of the Counties of Dewey, Ziebach and Corson, South Dakota and the County of Sioux, North Dakota for Leave to File Petition for Rehearing and Petition for Rehearing at 18, Solem v. Bartlett, 465 U.S. 463 (1984) [hereinafter Motion of Counties].

with little attempt to provide any consistent interpretation of legislative intent:

> [T]he Court has attempted to reconcile the conflict in the four preceding opinions by essentially holding that the determination in one surplus land act case bears little relation to the next, and that each must be decided on a clean slate. This approach ignores the historical threads binding together these different manifestations of the federal Indian policy of the turn of the century, and hinders any inquiry into true legislative intent.[31]

The state of disestablishment law circa 1985-1986 could perhaps best be characterized as a state of confusion. Looking down "the road" and speculating what the future may hold for disestablishment litigants, one is left to wonder, "Are there no exits from this maze of legal detours and deadends?" Has the Court become so firmly grounded in "literalism" as a basis for statutory construction that despite that chaos which results, it will not deviate from the present case-by-case course? Will the confusion that is exemplified by the most recent disestablishment case, *Utah v. Ute Indian Tribe*, continue to plague this area of the law?

UTAH V. UTE INDIAN TRIBE: A CRITICAL JUNCTURE IN THE DEVELOPMENT OF DISESTABLISHMENT CASE LAW

The next case in the evolution of judicial standards for determining Congressional intent in disestablishment cases has yet to be decided by the United States Supreme Court. *Utah v. Ute Indian Tribe* has, at this writing, wound its way through federal district court (where a 100-page district court opinion was issued), the U.S. Court of Appeals for the Tenth Circuit, and an *en banc* hearing before the entire panel of Tenth Circuit judges.

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[31] Motion of Counties at 7.

A petition for certiorari has been filed in the hope that the Supreme Court will accept the opportunity to clarify disestablishment issues after *Solem*.[32]

At issue is the continuing or diminished reservation status of the Uncompahgre Reservation and the Uintah Reservation, approximately four million acres. If the *en banc* decision is allowed to stand, the Tenth Circuit will have judicially recreated the second largest Indian reservation, in terms of land area, in the United States.[33]

At the district court level, the court was presented with a voluminous record which included 217 legislative documents and 485 historic documents, 1864-1978. In the trial court's lengthy opinion, a detailed historical analysis was undertaken in the search for Congressional intent. The subsequent decision by the Tenth Circuit *en banc* court largely ignored the vast wealth of historical data available in the trial record, relying on language rather than legislative history, and a strained interpretation of *Solem*, in arriving at its anti-disestablishment decision.

Had the *en banc* majority applied the standards set forth in *DeCoteau* and *Rosebud*, the court, given the historical record at its disposal, should clearly have concluded that the reservation had been disestablished, at least in part. 1) The fact of the legislative act included heretofore powerful reference to "public domain."[34] 2) Surrounding circumstances evidenced an intent to dis-

[32] *See* Utah v. Ute Indian Tribe, *supra* note 3.

[33] Petition for Writ of Cert., Utah v. Ute Indian Tribe, *supra* note 2, at 8.

[34] Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Santa Fe Mining, Inc. in Support of the Petition for Certiorari, Utah v. Ute Indian Tribe, 521 F. Supp. 1072, *aff'd in part and rev'd in part*, 716 F.2d 1298 (10th Cir. 1983), *aff'd in part and rev'd in part, on rehearing en banc*, 773 F.2d 1087 (10th Cir. 1985), *petition for cert. filed*, 55 U.S.L.W. 3071 (U.S. May 5, 1986) (No. 85-1821) at 6, 9. [Hereinafter Santa Fe Amicus Brief].

establish, as did "subsequent events" and demographic information deemed so persuasive in *Solem*. The population and land use of the disputed area is over 90% non-Indian.[35] The federal government had not treated part of the area as an Indian reservation since 1897.[36] The tribe itself had obtained a montary award in its claims action [Ute Indian Tribe v. U.S., 4 Ind. Cl. Comm. 707 (1965)] based on the tribe's allegation that it had "lost the reservation."[37] 3) Documented legislative history also indicated an intent to disestablish.[38]

However, the Tenth Circuit *en banc*, in an expansive reading of *Solem*, concluded (5-2 decision) that despite the unequivocal language of disestablishment the reservations had survived. The *en banc* majority refused to analyze the "surrounding circumstances" and "legislative history" factors which the *Rosebud* court set forth in its standard for interpreting surplus lands enactments.[39] Section 5 of the General Allotment Act was virtually ignored.

The *en banc* decision has further confused an already complicated body of case law. Petitioners make a convincing plea for clarification of disestablishment standards in the aftermath of *Solem*:

> Only this Court can correct the *en banc* majority's misreading of *Solem*, a misreading that not only result in transforming a vast region of the State of Utah into an Indian reservation, but also would threaten to have a similar effect throughout the West-

[35] Petition for Writ of Cert, Utah v. Ute Indian Tribe, *supra* note 2 at 5.

[36] *Id.* at 8, citing Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, at 6, Andrus v. Utah, 446 U.S. 500 (1980) (No. 78-1522) (September 25, 1979).

[37] *Id.* at 9.

[38] *Id.* at 15-30.

[39] *Id.* at 22. See also Santa Fe Amicus Brief, *supra*, note 32.

> ern States in other areas that are not now considered to be Indian reservations. Already the Navajo Tribe of Indians, armed with the decision below, claims that 1.9 million acres in New Mexico, which were "restored to the public domain" in the early 1900's are nevertheless part of an Indian reservation because the *en banc* majority's decision here renders "unsound" the view that such language ends reservation status.[40]

The case has potential ramifications that extend far beyond the immediate controversy in Utah.[41] *Ute* is a critical juncture in the development of disestablishment case law. The Supreme Court, by granting certiorari, could seize the opportunity to provide needed clarification.

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[40] *Id.* at 12.

[41] The Navajo tribe has asserted jurisdiction over 1.9 million acres. Navajo Tribe of Indians v. Satte of New Mexico, U.S. Dist. Ct. No. CIV 82-1148 JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764. The social, economic, and political tensions created when land is "re-established" as reservation land after extended periods of non-Indian settlement were alluded to in Motion of the Counties, *supra* note 7, at 4-5:

> [I]t ought not be the task of the Court to remake history by revising the effect of acts of Congress in order to conform them to modern policy, no matter how tempting such a course might be. Unfortunately, that is just what the Court has undertaken in this case. The result has been the perpetuation of a cruel historical hoax on thousands of innocent homesteaders and their descendants in the Cheyenne River area. These ranchers and farmers now find themselves after the passage of many decades, suddenly thrust into the unenviable status of residents of an Indian reservation, where their elected officials have only limited jurisdiction and where they have no effective voice in the governance of their affairs and property by tribal governments.

CONCLUSION

If congressional intent determinations in disestablishment cases are to develop into a coherent body of law, two preconditions must be met. First, the Court must adopt and consistently apply a standard for statutory construction. The standard set forth in *DeCoteau* and *Rosebud* provides a ready model. Second, the Court must have access to necessary historical data if the standard adopted includes "legislative history" or "surrounding circumstances" elements.

The second precondition can only be met if historians work with lawyers to compile, analyze, and explain the significance of historical data. The need is great for general research relating to the General Allotment Act, particularly the § 5 surplus lands provisions. In other determinations, as well, historians can aid the courts in providing a proper historical perspective for a fair adjudication of issues relating to Congressional intent.

With proper historical guidance, Courts may be less tempted to adopt a literalist approach to statutory construction that can only deepen the state of confusion that typifies disestablishment adjudications of the recent past.

[Table and Drawing Omitted in Printing]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES

The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.

According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interior, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States,* Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op. cit.,* Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as

all other tribal lands on the existing reservation, subject to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ, PETITIONER

v.

G. RAYMOND ARNETT

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15, 1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: [*Provided,* That any Indian now located upon reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a

> family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by setttlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between

settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of

> Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
* * * *	
California	All Indian county within the State.
* * * *	

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

> Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

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[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any

particular reservation. Consequently a number of Acts requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent,* 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour,* 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California,* p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra,* at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indian had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

> This reservation is well located, and the improvements are suitable and of considerable value. There

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[2] There are excerpts from Kroeber at A. 34-44.

[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton,* 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra,* at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra,* which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea,* 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River

[4] See *Crichton, supra,* 3 I.D. at 208.

[5] Act of July 27, 1868, 15 Stat. 198, 221.

Reservation. In *Donnelly* v. *United States,* 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm.

[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allottments,there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra,* however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent,* 368 U.S. 351, 357-359; *Ellis* v. *Page,* 351 F.2d 250 (C.A. 10); *State* v. *Molash,* 199 N.W. 2d 591 (Sup. Ct. S.D.).

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the

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[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra.*

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.,* as amended, 25 U.S.C. 461 *et seq.*

Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further done at that time to make allotments or authorize white settlement.[10] In October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it

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[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton, supra,* 33 I.D. at 214.

[11] H. Rept. No. 161, 52d Cong., 1st Sess.

[12] 23 Cong. Rec. 1598-1599.

[13] At pages 2-3, *supra,* we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.[14]

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[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton, supra*, 33 I.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to " 'cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page*, 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State* v. *Molash*, 199 N.W. 2d, 591 (Sup. Ct. S.D).; *Leech Lake Band* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16. The consistent course

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[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al.* v. *United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath River. * * *

Testimony at a congressional hearing held in 1932 [16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an additional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?
>
> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Congress in the Act of December 24, 1942, 56 Stat. 1081,

[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See A. 12-16.

[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * *." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer Indian country has been before the courts many times and has been addressed by Congress in defining Indian

[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.): Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the General Allotment Act and the Act in question "disclosed

that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were controlling in *Seymour*, are also present, and equally controlling, here.

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[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including "'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *.'" 368 U.S. at 357-358.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

In *Donnelly* v. *United States,* 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken

[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

[21] The Court held that it was. *Id.* at 264.

> country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan,* 369 U.S. 45; *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States,* 391 U.S. 404. See also *Kennerly* v. *District Court of Montana,* 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

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MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

v.

JOHN LEE FEATHER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton-Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court*, and expresses the views of the United States in the closely related case of *Erickson* v. *Feather*; *certiorari* was granted in both cases on June 3, 1974.

1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court

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[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U.S.C. 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867.

for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A, 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agrement between the United States and the Tribe dated December 12, 1889, and the Act of March 3, 1891, 26 Stat. 989, 1036, ratifying that agreement, was

to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

2. Erickson v. Feather, et al. (No. 73-1500)

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * *," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent,* 368 U.S. 351], *Mattz* [v. *Arnett,* 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See *Cohen, supra* at 78-80,

(§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash,* 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands." Others fled, "fearing the indiscriminate vengance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their reservation as hereinafter designated) * * *" (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further provided (*id.* at 6; Art. 10):

> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided,* That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

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[2] In connection with our brief *amicus curiae* in *Antoine* v. *The State of Washington,* No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971." That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation. This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota.

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five [of the General Allotment Act of 1887] * * *")*id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be—

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *. [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern

[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).

> over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has ~~remcained~~ remained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson,* that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by non-Indians, removed that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "lands embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government,

should not depend on the title to the lot within the Reservation where a particular act takes place. There is no reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

ARGUMENT

I

THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress

deliberately terminated or changed the boundaries of the Reservation by the Act of 1891.

1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau*, Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe *"within the limits of the reservation"* (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilization" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.] [6]

[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E. Ex. Doc. No. 66, 51st Cong., 1st Sess., p. 19. Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity. For the future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education and civilization" of the "bands of Indians or member thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

2. The References to the General Allotment Act Show the Reservation Was Maintained

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to

allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divde reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice*, 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.

3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered

In *Mattz* v. *Arnett, supra*, this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine*, 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Nice*, 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra*, 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").
2. 27 Stat. 63 (1892) (* * * the North Half of the Colville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").
3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries

a. The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States,* 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders because the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

b. The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold, rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the applica-

tion of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment any more than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra,* 368 U.S. at 354-359.

5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *" (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau,* interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous—both as to its general meaning and as to whether it applied only to the school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws

of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the unallotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

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[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general authorization for state selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States."

II

SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

a. The most important administrative interpretation of the 1891 Act is a contemporaneous proclamation of President Harrison opening the Reservation for settlement (Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled 'Schedule of lands *within the Lake Traverse Reservation opened to settlement* by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the "Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-

Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *
>
> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * *.
>
> [Annual Report, Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States*, 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * *. [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family

relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was opened, but not dissolved. See also *United States* v. *Rickert*, 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State*, 319 F. 2d 845 (C.A. 8),

overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is, of course, entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra*, 368 U.S. at 357; *Mattz* v. *Arnett, supra*, 412 U.S. at 505.[8]

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[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but the 1918 map shows it was a "former" reservation. Modern maps show the Reservation simply as a "reservation." We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit. Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today. The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v. *Celestine*, 215 U.S. 278, 285-286. This process of clarification continued with enactment of 18 U.S.C. 1151 and this Court's subsequent decision in *Seymour* v. *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a

b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton Reservation or Agency[9] and has never referred to the Reservation as a "former reservation," as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating land-

reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra,* 188 U.S. at 432 (see DeCoteau, Resp. Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576. In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report, *The Lower Sioux Indian Community in Minnesota, et al.,* Docket No. 363 (June 1967) before the Indian claims Commission.

> holdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabiiltation and enhancement of the total resource potential *of the reservation.* [Emphasis added.]

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase *"other land on the reservation."* Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

III

THE TRIBE'S INHERENT RIGHT OF SELF-GOVERNMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITY OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of 1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising

its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra*. Compare *Williams* v. *Lee*, 358 U.S. 217, 222-223; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring patchbook jurisdiction—state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission, supra*, 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * *."

See also *Williams* v. *Lee, supra*, 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCoteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians * * * .

Tribal control over domestic relations, at issue in *DeCoteau*, is at the heart of this right of Tribal self-government. See, *e.g.*, *United States* v. *Quiver*, 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe

[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for In-*

opposed such practices in a tribal resolution on July 6, 1972, which states:

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Roberts County Court on July 7, 1972 and future cases of this nature.

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dian Children with Special Needs, BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.

The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar proceedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted.

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NOVEMBER 1974.

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[11] The Tribe has assumed such authority under its tribal code.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

v.

HONORABLE RICHARD KNEIP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of

each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain" (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement Congress rejected this agreement

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[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App. 113.

in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school sections), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government. See Pet. App. 120, 121, 123, 127.

dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * *. [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one per-

[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

son holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support, and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explicitly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910, Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions

in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of

their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent,* 368 U.S. 351, and *Mattz* v. *Arnett,* 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeds were explicitly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock,* 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.,* the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian reservation * * *" (48 Stat. 986). Moreover, numerous communications and reports show that the Department, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.

The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

ARGUMENT

I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama,* 118 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw,* 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent,* 368 U.S. 351;

Mattz v. *Arnett,* 412 U.S. 481; *DeCoteau* v. *District County Court,* 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour,* this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over

[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."

Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour,* that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" (*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department, and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status under the Indian Reorganization Act of 1934 (368 U.S. at 357, n. 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id.* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour, supra,* 368 U.S. at 356, n. 12.

[8] After this Court's decision in *Seymour,* the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to settlement were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau*, the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*

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the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, United *States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.

(420 U.S. at 447-449), stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and *Seymour*, consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts

paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not read the

[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James McGlaughlin, repeatedly stressed to the Indians that their lands could be sold

cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians with white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary

without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804.

of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby, vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished"). See also *Mattz* v. *Arnett, supra,* 412 U.S. at 504, n. 22.[12]

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger,* 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for

[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau, supra,* and found sufficient to terminate the Reservation. But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government. The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Acts of 1907 and 1910, both of which were passed without tribal consent.

the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra,* p. 1A).

The provision for school lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock,* 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act for South Dakota, provided that the State was entitled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit (185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within

[13] Congress was well aware of the importance of *Minnesota* v. *Hitchcock.* After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat. 950. The Committee Report on the bill (H.R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep. No. 2948, 56th Cong., 2d Sess. 1 (1901)).

the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)).

> The opinion of the committee is that this section is *not necessary*, as under *existing law* sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum

[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain.

[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet. App. 16). See *DeCoteau* v. *District Court, supra*, 420 U.S. at 447-449. The House Indian Affairs Committee understood that, under such circumsances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished. See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra*. The House Report was issued on May 17, 1902, after the *Hitchcock* decision. Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock*. *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113. It was the House Report that accurately reflected existing law.

The court of appeals mistakenly relied (Pet. App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary. The court then juxtaposed those statements with statements made in 1904 (Pet. App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.

certain was abandoned, however, subsequent bills included an express grant for school lands.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed. The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satified that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The*

> *title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going to object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose voluntarily to include a grant of school lands to provide schools in the opened territory.[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States,* 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States,* 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the

[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts.

United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *." *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust. Minnesota* v. *Hitchcock,* 185 U.S. 373, 394, 398. * * *
>
> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"*

> in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement he makes that these lands will probably go back to the Government, and that these people are really in distress—
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.
>
> Mr. FOSTER: Certainly. I understand.
>
> Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889,* so far as these reservations in South Dakota are concerned, *the money goes into the Treasury,* and we appropriate it for the support and civilization of the Indians. [Emphasis added.]

The point was also emphasized later in the debate (*ibid.*):

> Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.
>
> Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz* v. *Arnett, supra,* 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratnew,* 104 U.S. 621; *New York*

ex rel. Ray v. *Martin,* 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1889

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * *," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations." 48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain outside the geographic boundaries* of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).

The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified: [17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testified [18]:

> * * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation.* Indian land is not lost in solid blocks. It passed into white hands in scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54

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[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added).

I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp. 26-27, takes an opposite viewpoint, relying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I.D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian

The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

reservation that were opened but not restored to the public domain. Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction.

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments. Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore, must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * *."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation, which townsites were established by the Department, pursuant to authority contained in the Act of March 2, 1907, *supra*." *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an

[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat. 987) of the Indian Reorganization Act. That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *." Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." The Rosebud Sioux Tribe has had a law and order system since 1877, supported by Congressional appropriations. 19 Stat. 254, 257 (Art. 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p. 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U.S. 556. See also *Report of Commissioner of Indian Affairs*, 1881, p. 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p. 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App. C, *infra*.

"Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[23]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County*, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County*, South Dakota, opened to settlement and entry by the act of March

[23] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E. ½ of Section 35, T. 42 N., R. 33 W. 6th P.M. in Mellette County. 78 Stat. 560.

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat. 626 (1956), *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S. at 496, n. 17 and 505.

2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation.* The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation,* and the allotments are more compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

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[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reservation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.

That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and

identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Diminished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued, prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but

near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has generally regarded the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Mattz* v. *Arnett, supra,* 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet. App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau, supra,* 420 U.S. at 444-445,

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[26] See App. A, Brief of the United States as *Amicus Curiae* in the court of appeals below.

[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion*, 18 S.D. L. Rev. 85 (1973).

we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction*. Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.*, A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz, supra,* 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of criminal and civil jurisdiction within the opened Reservation.[28] Although the court of appeals relied on scattered remarks

[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time aboltion of the Reservation could be considered.

that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory County, South Dakota, remaining unallotted, in return for a lump sum payment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (*Id.* at 15).[29] That ratification of course never occurred.

[29] Approval of three fourths of all the adult male Indians, before an agrement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901 Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCouteau, supra.* That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was

[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).

continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the "reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reserva-

tion but to the " 'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.' " *Putnam* v. *United States,* 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

At other times, "diminished reservation" seems to mean only the closed portion of the Reseravtion. The Report

[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc. 40B):

"The diminished reservation,—that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships,* which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added.]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * *" *after* the opening. To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County.

In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * *" to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders.

prepared by the Fish and Wildlife Service in 1942 (App. F, *infra,* at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * *" (*supra,* p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to the lands in question as *"lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * *" (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * *.

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the

Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation,* at or near Saint Francis Mission * * *; also, at or near Red Leaf Camp * * *; also, at or near Oak Creek * * ; also, at or near Antelope Creek * * *; also, at or near Little White River * * *; *also, at or near Ponca Creek.* [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * *" (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * *. [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) "authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):

> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation* in South Dakota * * *" (App. II, *infra*, pp. 44A, 50A) (emphasis added.) The lands acquired were described by the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946)):

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.,* a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * *[32]

[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec .7120, and referred to the House Committee on Indian Affairs. 92 Cong. Rec. 7399-7400. There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec. 3219 (1947), it did not become law.

Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen,* 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe,* 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington,* 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

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